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Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES

ARTHUR HARVEY, M.D., individually and as beneficiary of the Arthur Harvey, M.D. Inc. Employee Defined Benefit Plan, and CECILIA M. CROWE, as Guardian ad Litem for DOLORES THOMAS,

Petitioners,

v.

SALOMON SMITH BARNEY, INC.,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

Stephen Krosschell, Esq.
Counsel of Record
Joel A. Goodman, Esq.
Goodman & Nekvasil, P.A.
14020 Roosevelt Blvd., Suite 808
P.O. Box 17709
Clearwater, Florida 33762
(727) 524-8486
Attorneys for Petitioners

8409

QUESTIONS PRESENTED

NASD Rule 10304 provides that investors' disputes are not eligible for submission to arbitration if six years have elapsed from the occurrence or event giving rise to the disputes. The courts below relied on this Rule to enjoin the Petitioners' claims from arbitration. The questions presented here are:

I. Did the Eleventh Circuit correctly adhere to its minority position, rejected by three-quarters of the jurisdictions, that courts, not arbitrators, interpret Rule 10304?

II. Did the Eleventh Circuit correctly refuse to allow the Petitioners to arbitrate disputes which other courts have found to be arbitrable within the six-year time frame of Rule 10304, including discovery, fraudulent concealment, affirmative advice not to sell, a drop in distributions, misleading monthly statements, failure to monitor and supervise, and other wrongful acts?

III. Did the district court properly enjoin the Petitioners' arbitration claims, when other courts hold that being required to undergo an arbitration which may later be set aside is not irreparable injury?

IV. Did the district court properly enjoin Petitioner Thomas' claims without appointing a guardian, when she had become incompetent, had requested a guardian, and had not yet filed any evidence or otherwise responded to the summary judgment motion against her?

PARTIES TO THE PROCEEDINGS

Petitioners

Arthur Harvey, M.D., individually and as beneficiary of the Arthur Harvey, M.D. Inc. Employee Defined Benefit Plan, and Cecilia M. Crowe, as Guardian ad Litem for Dolores Thomas

Respondent

Salomon Smith Barney, Inc.

Other Party

Margaret G. Ostrander was a party to the proceedings below, but she has no interest in the outcome of the Petition.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vii

OPINIONS BELOW 1

JURISDICTION 1

FEDERAL STATUTES INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 4

I. The Decision Below that Courts, not Arbitrators, Should Interpret NASD Rule 10304 Conflicts with Many Decisions of this Court and Other Courts 4

A. Three-Quarters of the Jurisdictions Disagree with the Eleventh Circuit's Minority Position 4

B. The Decision Below Conflicts with Decisions Applying a Strong Presumption of Arbitrability to the Scope of an Arbitration Obligation 6

C. The Decision Below Conflicts with Decisions Treating Time Bars in Arbitration Agreements as Procedural Conditions or Defenses for Arbitrators to Resolve 8

D. The Decision Below Conflicts with Decisions Recognizing that NASD Rule 10324 Empowers NASD Arbitrators to Interpret Rule 10304 11

E. The Decision Below Conflicts with Decisions Which Treat the NASD Code of Arbitration Procedure as a Consistent Whole 13

F. The Decision Below Conflicts with Decisions Holding that, When Broad Arbitration Obligations Exist, Only Forceful Evidence will Exclude a Claim from Arbitration 14

G. The Decision Below Conflicts with the NASD's and the SEC's Intent to Provide Investors with a Speedy and Inexpensive Procedure for Resolving Disputes 15

H. The Decision Below Conflicts with this Court's Decision to Construe Shearson Arbitration Agreements Against the Drafter 17

I. The Decision Below Conflicts with New York Law That Six-Year Issues are for the Arbitrators 17

J. The Decision Below Conflicts with the Second Circuit's Decision that Rule 10304 is Not Incorporated Into a Brokerage Firm Customer Arbitration Agreement 18

II. The Decision Below Conflicts with Numerous Cases Interpreting the Six-Year Rule to Allow Claims Substantially Identical to Those of the Petitioners ... 19

A. The Decision Below Conflicts with Decisions of this Court and the Third Circuit Requiring a Presumption of Arbitrability 19

B. The Decision Below Conflicts with this Court's Precedents by Applying a Merits-Related Test for Arbitrability 20

C. The Decision Below Conflicts with Other Decisions, the NASD's Own Views, and the Plain Language of Rule 10304 by Holding that Discovery and Continuing Fraud Cannot be Events Within the Six-Year Time Period 22

D. The Decision Below Conflicts with Decisions that Investors Seeking to Arbitrate Statutory Claims Under Self-Regulatory Organization Rules Do Not Forgo Substantive Rights 24

E. The Decision Below Conflicts with Decisions that a Claim Accrues When Damages are Sustained .. 25

F. The Decision Below Conflicts with Decisions that Affirmative Advice Not to Sell is an Event Within the Six-Year Rule 26

G. The Decision Below Conflicts With Other Decisions by Holding that Petitioners' Other Claims Were Not Timely 26

III. The Decision Below Conflicts with Decisions that Being Required to Undergo an Arbitration Which May Later be Set Aside is Not Irreparable Injury 28

IV. The Decision Below Conflicts With Decisions Requiring Appointment of a Guardian for Thomas . 29

V. Conclusion 30

APPENDIX

Appendix A
Court of Appeals Opinion, filed August 9, 2001 .... 1a

Appendix B
Court of Appeals Order, filed August 9, 2001,
Denying Petition for Hearing En Banc 12a

Appendix C
District Court Order, filed April 27, 2000,
Entering a Permanent Injunction Against
the Petitioners 14a

Appendix D
Magistrate's Order, filed March 28, 2000,
Granting in Part and Denying in Part
Petitioner Thomas' Motion for Appointment
of Guardian Ad Litem at Plaintiff's Expense 28a

Appendix E
District Court Order, filed August 31, 1999,
Entering a Preliminary Injunction Against
the Petitioners 31a

TABLE OF AUTHORITIES

CASES

Agency Holding Corp. v. Malley-Duff & Assoc.,
483 U.S. 143 (1987) 24

Armijo v. Prudential Ins. Co. of Am.,
72 F.3d 793 (10th Cir. 1995) 8

AT&T Tech., Inc. v. Communications Workers of Am.,
475 U.S. 643 (1986) 7, 14, 20

Barnett Sec., Inc. v. Faerber,
648 So. 2d 265 (Fla. Dist. Ct. App. 1995) 5

Bailey v. Glover,
21 Wall 342, 22 L. Ed. 636 (1874) 23

Bayley v. Fox,
671 N.E.2d 133 (Ind. Ct. App. 1996) 5

Blue Chip Stamps v. Manor Drug Stores,
421 U.S. 723 (1975) 26

Case & Co. v. Board of Trade,
523 F.2d 355 (7th Cir. 1975) 23

Cogswell v. Merrill Lynch, Pierce, Fenner & Smith Inc.,
78 F.3d 474 (10th Cir. 1996) 4, 21

Corporate Securities Group v. Lind,
753 So. 2d 151 (Fla. Dist. Ct. App. 2000) 5

Easyriders Freedom F.I.G.H.T. v. Hannigan,
92 F.3d 1486 (9th Cir. 1996) 28

Edward D. Jones & Co. v. Sorrells,
957 F.2d 509 (7th Cir. 1992) 5

Emery Air Freight Corp. v. Local Union 295,
786 F.2d 93 (2d Cir. 1986) 28

First Options of Chicago, Inc. v. Kaplan,
514 U.S. 938 (1995) 6, 7

FSC Sec. Corp. v. Freel,
811 F. Supp. 439 (D. Minn. 1993) 22

FSC Sec. Corp. v. Freel,
14 F.3d 1310 (8th Cir. 1994) 5, 12, 22

Fujisawa Pharmaceutical Co. v. Kapoor,
115 F.3d 1332 (7th Cir. 1997) 21

Gaines v. Financial Planning Consultants, Inc.,
857 S.W.2d 430 (Mo. Ct. App. 1993) 5, 10

Gardner v. Parson,
874 F.2d 131 (3d Cir. 1989) 29

Goldberg v. Parker,
[1995 Transfer Binder] Fed. Sec. L. Rep.
(CCH) ¶ 98,749, 1995 WL 396568
(N.Y. Sup. Ct. April 12, 1995) 22

Holmberg v. Armbrecht,
327 U.S. 392 (1946) 23

International Union of Operating Engineers v. Flair Builders, Inc.,
406 U.S. 487 (1972) 14

J.E. Liss & Co. v. Levin,
201 F.3d 848 (7th Cir. 2000) 26

John Wylie & Sons v. Livingston,
376 U.S. 543 (1964) 8, 9, 20

Kennedy, Cabot & Co. v. NASD, Inc.,
49 Cal. Rptr. 2d 66 (Cal. Ct. App. 1996) 5

Kidder, Peabody & Co. v. Brandt,
131 F.3d 1001 (11th Cir. 1997) 16

Kramer v. Smith Barney,
80 F.3d 1080 (5th Cir. 1996) 25

Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit,
507 U.S. 163 (1993) 29

Local 285 v. Nonotuck Resource Assoc.,
64 F.3d 735 (1st Cir. 1995) 5

Martin v. Richey,
711 N.E.2d 1273 (Ind. 1999) 25

Mastrobuono v. Shearson Lehman Hutton, Inc.,
514 U.S. 52 (1995) 13, 17, 18

Mathews v. Kidder, Peabody & Co.,
161 F.3d 156 (3d Cir. 1998) 21

Mercury Constr. Corp. v. Moses H. Cone Memorial Hosp. (In re Mercury Constr. Corp.),
656 F.2d 933 (4th Cir. 1981) 7

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cohen,
62 F.3d 381 (11th Cir. 1995) 9, 13

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Havird,
518 S.E.2d 48 (S.C. Ct. App. 1999) 5, 12

Merrill Lynch, Pierce, Fenner & Smith v. Masland,
896 F. Supp. 396 (M.D. Pa. 1995) 27

Mid-State Sec. Corp. v. Edwards,
706 A.2d 773 (N.J. Super. Ct. App. Div. 1998) 5, 12

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,
473 U.S. 614 (1985) 16, 24

Moses H. Cone Hosp. v. Mercury Constr. Corp.,
460 U.S. 1 (1983) 7

Moses v. Burgin,
445 F.2d 369 (1st Cir. 1971) 23

Ohio Co. v. Nemecek,
98 F.3d 234 (6th Cir. 1996) 22

Osler v. Ware,
114 F.3d 91 (6th Cir. 1997) 5, 27

O'Neel v. NASD, Inc.,
667 F.2d 804 (9th Cir. 1982) 5

PaineWebber Inc. v. Bybyk,
81 F.3d 1193 (2d Cir. 1996) 5, 12, 15, 18

PaineWebber Inc. v. Elahi,
87 F.3d 589 (1st Cir. 1996) 5, 9, 10

PaineWebber Inc. v. Farnam,
870 F.2d 1286 (7th Cir. 1989) 28

PaineWebber Inc. v. Farnam,
843 F.2d 1050 (7th Cir. 1988). 28

PaineWebber Inc. v. Hartmann,
921 F.2d 507 (3d Cir. 1990) 29

PaineWebber Inc. v. Hofmann,
984 F.2d 1372 (3d Cir. 1993) 4, 19, 20, 22, 27

Patten Sec. Corp. v. Diamond Greyhound & Genetics, Inc.,
819 F.2d 400 (3d Cir. 1987) 6

Penthouse North Ass'n v. Lombardi,
461 So. 2d 1350 (Fla. 1984) 25

Prudential Sec., Inc. v. Kucinski,
947 F. Supp. 462 (M.D. Fla. 1996) 26, 27

Rotella v. Wood,
528 U.S. 549 (2000) 24

Schulte v. Prudential Ins. Co. of Am.,
133 F.3d 225 (3d Cir. 1998) 8

Scott v. Boos,
215 F.3d 940 (9th Cir. 2000) 21

Shahan v. Staley,
932 P.2d 1345 (Ariz. Ct. App. 1996) 5, 12

Shearson/American Express, Inc. v. McMahon,
482 U.S. 220, 233 (1987) 16, 24, 25

Smith Barney, Inc. v. Bardolph,
509 S.E.2d 255 (N.C. Ct. App. 1998) 5, 12

Smith Barney, Inc. v. Keeney,
570 N.W.2d 75 (Iowa 1997) 5, 12, 13

Smith Barney, Inc. v. Painters Local Union No. 109 Pension Fund,
579 N.W.2d 518 (Neb. 1998) 5, 12-14

Smith Barney, Inc. v. Potter,
725 So. 2d 1223 (Fla. Dist. Ct. App. 1999) 3

Smith Barney, Inc. v. Vogele,
967 F. Supp. 165 (E.D. Va. 1997) 27

Smith Barney Shearson, Inc. v. Boone,
47 F.3d 750 (5th Cir. 1995) 5, 10

Smith Barney Shearson, Inc. v. Sacharow,
689 N.E.2d 884 (N.Y. 1997) 5, 12, 17

Stateside Machinery Co. v. Alperin,
526 F.2d 480 (3d Cir. 1975) 28

Steelworkers v. Warrior & Gulf Navigation Co.,
363 U.S. 574 (1960) 7, 14

United States Liability Ins. Co. v. Haidinger-Hayes, Inc.,
463 P.2d 770 (Cal. 1970) 25

Weisgran v. Marley Co.,
528 U.S. 440 (2000) 9

Weston Sec. Corp. v. Aykanian,
703 N.E.2d 1185 (Mass. App. Ct. 1998) 5, 12

STATUTES AND RULES

9 U.S.C. § 2 1

15 U.S.C. § 78o-3(b)(6) 16

18 U.S.C. § 1964(c) 21

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1332 3

29 U.S.C. § 1003 25

29 U.S.C. § 1113 25

Cal. Code Civ. P. § 1005(b) 29

Federal Rule of Civil Procedure 12(b)(6) 19, 20

Federal Rule of Civil Procedure 50(a)(2) 9

Federal Rule of Civil Procedure 65 30

OTHER AUTHORITIES

NASD Rule 10106 12

NASD Rule 10301(a) 6, 14

NASD Rule 10304 ..... *passim*

NASD Rule 10314(b) 10

NASD Rule 10321 10

NASD Rule 10324 11-13

NASD Rule 10332 10

NASD Rule 10333 10

Notice of Filing a Proposed Rule Change by NASD, Inc.,
18 S.E.C. Docket 1372, 1979 WL 16679 (Dec. 14, 1979) 16

N.Y.S.E. Rule 603 4

Random House Webster's Unabridged Dictionary,
443, 569 (2d ed. 1998) 24

Unif. Arbitration Act (2000) § 6(c),
7 U.L.A. 11 (Supp. 2001) 5, 6

Petitioners respectfully request this Court to issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, affirming an order of the United States District Court for the Southern District of Florida enjoining the Petitioners from arbitrating before the National Association of Securities Dealers, Inc. ("NASD").

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 260 F.3d 1302 and reproduced in Appendix A at App. 1a-11a. The decision of the Court of Appeals denying the petition for hearing *en banc* is unreported and reproduced in Appendix B at App. 12a-13a. The decision of the district court to enter a permanent injunction against the Petitioners is unreported and reproduced in Appendix C at App. 14a-27a. The decision of the magistrate to grant in part and deny in part Petitioner Thomas' request for appointment of a guardian at Respondent's expense is unreported and reproduced in Appendix D at App. 28a-30a. The decision of the district court to enter a preliminary injunction against the Petitioners is unreported and reproduced in Appendix E at App. 31a-39a.

JURISDICTION

The Court of Appeals entered its judgment on August 9, 2001, and simultaneously denied hearing *en banc*. This Court has jurisdiction under 28 U.S.C. § 1254(1).

FEDERAL STATUTES INVOLVED

Section 2 of the Federal Arbitration Act, 9 U.S.C. §§ 1-16 ("FAA"), provides as follows:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy

> thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

STATEMENT OF THE CASE

Petitioner Harvey, a California resident, purchased more than $1.1 million dollars of limited partnerships from predecessor firms of Respondent Salomon Smith Barney, Inc. ("Smith Barney"). He received significant distributions from his portfolio of limited partnerships through 1995 but thereafter his distributions dropped and he suffered substantial losses. In 1997, Harvey and Petitioner Thomas -- an Indiana resident -- along with a Florida resident and others jointly filed a claim in NASD arbitration in Florida against Smith Barney, alleging systemic limited partnership fraud.

Harvey, Thomas, and two others simultaneously sought a declaratory judgment from a Fort Lauderdale, Florida, state court that time-related defenses were matters for the NASD arbitrators, not the courts, to decide. This declaratory action focused on NASD Rule 10304, which provides as follows:

> **10304. Time Limitation Upon Submission**
> No dispute, claim or controversy shall be eligible for submission to arbitration under this Code where six (6) years have elapsed from the occurrence or event giving rise to the act or dispute, claim or controversy. This Rule shall not extend applicable statutes of limitations, nor shall it apply to any case which is directed to arbitration by a court of competent jurisdiction.

In response, Smith Barney sued Harvey in California state court, arguing that Rule 10304 barred Harvey's Florida arbitration. The California judge stayed the proceedings pending further action in Florida but said that, had the case been properly before him, he would "not adjudicate the timeliness issue. Arbitration will decide that issue."

In the Florida court, Smith Barney argued that Florida was an improper forum for the three plaintiffs who were not Florida residents. The court denied Smith Barney's *forum non conveniens* motion, because the arbitration was in Florida, but, over a dissent, Florida's District Court of Appeals found that the Fort Lauderdale trial court was indeed an improper venue for Harvey, Thomas, and the other out-of-state investor. *Smith Barney, Inc. v. Potter*, 725 So. 2d 1223 (Fla. Dist. Ct. App. 1999). The Florida Supreme Court declined to accept jurisdiction of Harvey's and Thomas' petition for review.

Smith Barney then sued in a Fort Lauderdale federal district court to enjoin Harvey's and Thomas' arbitration claims as untimely under NASD Rule 10304. Because Smith Barney was a New York resident, Harvey and Thomas were California and Indiana residents, and the amounts in controversy exceeded $75,000, the district court had diversity jurisdiction under 28 U.S.C. § 1332. The district court initially issued a preliminary injunction, App. at 39a,[1] and then permanently enjoined the arbitration on the ground that the Petitioners' claims were "point of sale" or "tolling" arguments and barred by NASD Rule 10304. App. at 21a, 23a, 26a. The court enjoined Thomas' claims, even though she had requested a guardian after becoming incompetent. A month later, the court appointed Thomas' daughter as her guardian.

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[1] The Eleventh Circuit dismissed as moot an appeal of this preliminary injunction, after Petitioners appealed the district court's final injunction.

On appeal, the Eleventh Circuit affirmed, finding that NASD Rule 10304 is a substantive eligibility requirement which courts may use to enjoin arbitration claims and that the district court had properly entered judgment against Thomas without appointing a guardian. App. at 5a-11a. The court simultaneously denied *en banc* review. App. at 13a

REASONS FOR GRANTING THE WRIT

I. The Decision Below that Courts, not Arbitrators, should Interpret NASD Rule 10304 Conflicts With Many Decisions of This Court and Other Courts.

A. Three-Quarters of the Jurisdictions Disagree with the Eleventh Circuit's Minority Position.

This Court should grant review to resolve a conflict over whether courts or arbitrators interpret NASD Rule 10304.[2] The Eleventh Circuit in its decision below adhered to its minority position, also adopted in the Third, Sixth, Seventh, and Tenth Circuits, that courts decide this issue.[3] Ten state jurisdictions and the First, Second, Fifth, Eighth, and Ninth Circuits,

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[2] Rule 10304 was formerly numbered as Section 15 of the NASD Code of Arbitration Procedure, and older cases cited in this Petition refer to the Rule as Section 15. The language in Rule 10304 also appears in the arbitration rules of other self-regulatory organizations, such as Rule 603 of the New York Stock Exchange. *See PaineWebber Inc. v. Hofmann*, 984 F.2d 1372, 1378 (3d Cir. 1993) ("The language of Rule 603 is, in all relevant parts, identical to the language of § 15 of the NASD Code.").

[3] *See Cogswell v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 78 F.3d 474 (10th Cir. 1996); *Edward D. Jones & Co. v. Sorrells*, 957 F.2d 509 (7th Cir. 1992); *Osler v. Ware*, 114 F.3d 91 (6th Cir. 1997); *PaineWebber v. Hofman*, 984 F.2d 1372 (3d Cir. 1993).

however, agree with the majority view that arbitrators, not courts, should interpret the Rule.[4]

The majority view that arbitrators should interpret Rule 10304 mirrors the general rule for enforcing arbitration time-bars. The court in *Local 285 v. Nonotuck Resource Assoc.*, 64 F.3d 735 (1st Cir. 1995), citing a long history of federal cases, found that arbitrators, not courts, properly interpret time limitations within an arbitration agreement. "Thirty years of Supreme Court and federal circuit court precedent have established that issues concerning the timeliness of a filed grievance are 'classic' procedural questions to be decided by an arbitrator . . . ." *Id.* at 739. The majority view is also reflected in section 6(c) of the Uniform Arbitration Act (2000), which provides that arbitrators "shall decide whether a condition precedent to arbitrability has been fulfilled." Unif. Arbitration Act (2000) § 6(c), 7 U.L.A. 11 (Supp. 2001). The drafters intended Section 6(c) "to incorporate the holdings of the vast majority of state courts and the law that has developed under the FAA that . . . issues of procedural arbitrability, i.e., whether prerequisites such as time limits, notice, laches, estoppel, and

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[4] *See FSC Sec. Corp. v. Freel*, 14 F.3d 1310 (8th Cir. 1994); *O'Neel v. NASD, Inc.*, 667 F.2d 804 (9th Cir. 1982); *PaineWebber Inc. v. Bybyk*, 81 F.3d 1193 (2d Cir. 1996); *PaineWebber Inc. v. Elahi*, 87 F.3d 589 (1st Cir. 1996); *Smith Barney Shearson, Inc. v. Boone*, 47 F.3d 750 (5th Cir. 1995); *Bayley v. Fox*, 671 N.E.2d 133 (Ind. Ct. App. 1996); *Gaines v. Financial Planning Consultants, Inc.*, 857 S.W.2d 430, 432 (Mo. Ct. App. 1993); *Kennedy, Cabot & Co. v. NASD, Inc.*, 49 Cal. Rptr. 2d 66 (Cal. Ct. App. 1996); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Havird*, 518 S.E.2d 48 (S.C. Ct. App. 1999); *Mid-State Sec. Corp. v. Edwards*, 706 A.2d 773 (N.J. Super. Ct. App. Div. 1998); *Shahan v. Staley*, 932 P.2d 1345 (Ariz. Ct. App. 1996); *Smith Barney, Inc. v. Bardolph*, 509 S.E.2d 255 (N.C. Ct. App. 1998); *Smith Barney, Inc. v. Keeney*, 570 N.W.2d 75 (Iowa 1997); *Smith Barney, Inc. v. Painters Local Union No. 109 Pension Fund*, 579 N.W.2d 518 (Neb. 1998); *Smith Barney Shearson, Inc. v. Sacharow*, 689 N.E.2d 884 (N.Y. 1997); *Weston Sec. Corp. v. Aykanian*, 703 N.E.2d 1185 (Mass. App. Ct. 1998). Florida state courts now appear to be in conflict on this issue. *Compare Barnett Sec., Inc. v. Faerber*, 648 So. 2d 265 (Fla. Dist. Ct. App. 1995), *with Corporate Securities Group v. Lind*, 753 So. 2d 151 (Fla. Dist. Ct. App. 2000).

other conditions precedent to an obligation to arbitrate have been met, are for the arbitrators to decide." *Id.* at 12 cmt. 2.

This Court should grant review to resolve this conflict.

B. The Decision Below Conflicts with Decisions Applying a Strong Presumption of Arbitrability to the Scope of an Arbitration Obligation.

The decision below conflicts with this Court's decisions requiring courts to presume arbitrability when deciding the scope of an arbitration obligation. Arbitration obligations unmistakably exist in this case, because Petitioner Harvey agreed seven times with Smith Barney's predecessor firms to arbitrate all disputes and controversies. Similarly, Smith Barney's NASD membership required it to arbitrate "[a]ny dispute, claim, or controversy" upon Thomas' demand. NASD Rule 10301(a).[5]

After courts determine (1) that arbitration obligations exist, as they clearly do in this case, courts must then decide (2) whether the parties agreed to allow the arbitrators to decide the scope of the obligation and, if not, (3) whether the scope of the obligation extends to the particular dispute. For question (2), courts presume that the parties did not agree "to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (quotation marks and brackets

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[5] *See Patten Sec. Corp. v. Diamond Greyhound & Genetics, Inc.*, 819 F.2d 400, 404 (3d Cir. 1987) (A "customer . . . can demand NASD arbitration of its disputes with [a dealer, and the dealer] . . . is compelled by its NASD membership to submit even absent a specific contractual arbitration undertaking directly with [the customer]."). Thomas likely also had an arbitration agreement with Smith Barney's predecessor firm, but the parties have not yet found it.

omitted). This Court, however, employs the opposite presumption for question (3).

> [T]he law treats silence or ambiguity about the question *"who* (primarily) should decide arbitrability" differently from the way it treats silence or ambiguity about the question *"whether* a particular merits-related dispute is arbitrable because it is within the scope of a valid arbitration agreement" -- for in respect to this latter question the law reverses the presumption.

Id. at 944-45.

This Court uses both an objective and a subjective standard for this latter presumption. Objectively, this Court requires courts to order arbitration "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *AT&T Tech., Inc. v. Communications Workers of Am.*, 475 U.S. 643, 650 (1986) (*quoting Steelworkers v. Warrior & Gulf Navigation* Co., 363 U.S. 574, 582-83 (1960)).

Subjectively, courts must resolve all doubts about an arbitration obligation's scope in favor of arbitration, including, as in this case, doubts about construing the contract language or whether delay is a defense. "[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is *the construction of the contract language itself* or an allegation of waiver, *delay*, or a like defense to arbitrability." *Moses H. Cone Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983) (emphasis added). In *Moses H. Cone Hosp.*, this Court affirmed a decision that "any claim of untimeliness, waiver or laches . . . is for the arbitrator and may not be an excuse for non-arbitrability." *Mercury Constr. Corp. v. Moses H. Cone Memorial Hosp. (In re Mercury Constr. Corp.)*, 656 F.2d 933, 942 (4th Cir. 1981).

Courts have often applied this principle to NASD arbitrations. "Because this court cannot say with certainty what is meant by "intrinsically insurance" claims [under NASD arbitration rules], . . . our mandate is clear: a presumption in favor of arbitration applies and doubts in construction are resolved against the resisting parties." *Schulte v. Prudential Ins. Co. of Am.*, 133 F.3d 225, 234 (3d Cir. 1998). "[T]o acknowledge the ambiguity [in NASD arbitration rules] is to resolve the issue, because all ambiguities must be resolved *in favor* of arbitrability." *Armijo v. Prudential Ins. Co. of Am.*, 72 F.3d 793, 798 (10th Cir. 1995).

Conspicuously absent from the decision below is any recognition and application of this strong arbitrability presumption. The question below was whether the arbitration obligations which plainly existed extended to the Petitioners' particular disputes. This question was by definition one of scope. Because three-quarters of the jurisdictions disagree with the Eleventh Circuit on the proper interpretation of NASD Rule 10304, the meaning and scope of the Rule must at least be ambiguous. The best evidence of the Rule's ambiguity is the 15 to 5 split among the jurisdictions regarding what it means. Because it is at least ambiguous, doubts about scope necessarily exist, and these doubts must be resolved in favor of arbitration. The Eleventh Circuit contradicted this Court's decisions by failing to recognize and apply this black letter principle of law.

C. The Decision Below Conflicts With Decisions Treating Time Bars in Arbitration Agreements as Procedural Conditions or Defenses for Arbitrators to Resolve.

In *John Wylie & Sons v. Livingston*, 376 U.S. 543, 556 n.11 (1964), this Court found that an agreement requiring an arbitration demand to "be filed . . . within four (4) weeks after [the grievance's] occurrence or latest existence" raised a

"procedural" question for the arbitrators, not the courts. "[I]ntertwined issues of 'substance' and 'procedure' growing out of a single dispute and raising the same questions on the same facts [should not] be carved up between two different forums, one deciding after the other." *Id.* at 557. If "the parties are obligated to submit the subject matter of a dispute to arbitration, 'procedural' questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator." *Id.* In the present case as in *John Wiley*, the underlying liability disputes between the parties are arbitrable. Rule 10304 is a related procedural question or defense properly left to the arbitrators.

Smith Barney's contrary arguments below focused entirely on the words "eligible for submission" in Rule 10304. In ordinary legal parlance, however, "submission" means submission of the cause to the finder of fact after the presentation of evidence and instructions on the law, as in submitting a case to a jury after trial. *See, e.g., Weisgran v. Marley Co.*, 528 U.S. 440, 448 n.4 (2000) ("Motion for judgment as a matter of law can be made at any time before *submission* of the case to the jury.") (*quoting* Federal Rule of Civil Procedure 50(a)(2), emphasis added). In appellate courts, cases are taken under "submission" after oral arguments, not when the notices of appeal are filed. The word "submission" in Rule 10304 thus reasonably refers to "submission for full adjudication of the merits, rather than submission for preliminary determinations, such as whether the claim is time-barred, or whether the appropriate fee was paid, or whether the claim was submitted on the proper forms." *PaineWebber Inc. v. Elahi*, 87 F.3d 589, 600 (1st Cir. 1996).

Because "submission" can refer to the time when arbitrators take the case under "submission," *after* receiving the parties' claims, resolving preliminary disputes, and hearing the evidence, Rule 10304 is merely a reason for arbitrators to end an arbitration after it starts. It is not a

substantive bar *to* filing an arbitration but a procedural condition or defense *in* the arbitration which a claimant must satisfy before obtaining an award, like numerous other procedural conditions in the NASD arbitration rules. Arbitrators might similarly decide not to grant relief if a party defaulted by not filing an answer under NASD Rule 10314(b), did not comply with discovery obligations under NASD Rule 10321, or did not pay fees under NASD Rules 10332 and 10333.

> Many a mandatory procedural rule could be called an "arbitrability" rule if the failure to comply prevented arbitration on the merits. For example, one might say that, by incorporating the NASD's rules, the parties agreed to arbitrate only those disputes for which the arbitrator's fee has been paid; questions relating to the fee could be called "arbitrability" issues. It would be illogical, though, to conclude that the court, not the arbitrator, must determine if the proper fee was paid.

PaineWebber Inc. v. Elahi, 87 F.3d 589, 596 (1st Cir. 1996).

Courts have applied to NASD Rule 10304 this principle that time-bars within arbitration agreements are procedural conditions for arbitrators to interpret. For example, in *Smith Barney Shearson, Inc. v. Boone*, 47 F.3d 750, 754 (5th Cir. 1995), the Fifth Circuit held against Smith Barney that "the timeliness issues raised in this case [relating to Rule 10304] are issues of procedural arbitrability and must be decided by the arbitrator." In *Gaines v. Financial Planning Consultants, Inc.*, 857 S.W.2d 430, 432 (Mo. Ct. App. 1993), the court agreed with other courts that Rule 10304 "is a procedural provision to be interpreted by the arbitrators rather than a substantive limitation on arbitrability to be interpreted by the court."

The decision below conflicts with these decisions that procedural time-bar issues relating to otherwise arbitrable disputes are matters for arbitrators, not courts, to decide.

D. The Decision Below Conflicts with Decisions Recognizing that NASD Rule 10324 Empowers NASD Arbitrators to Interpret Rule 10304.

The Eleventh Circuit's decision conflicts with cases relying on NASD Rule 10324, which authorizes the arbitrators to interpret other NASD rules, including Rule 10304. Rule 10324 (formerly numbered as Section 35) provides as follows:

> The arbitrators shall be empowered to interpret and determine the applicability of all provisions under this Code and to take appropriate action to obtain compliance with any rulings by the arbitrator(s). Such interpretations and actions to obtain compliance shall be final and binding upon the parties.

Courts have repeatedly decided that, pursuant to Rule 10324, the parties agreed to arbitrate six-year issues under Rule 10304. Rule 10324 can be understood both (1) as expressly stating the scope of the arbitration agreement, to which a broad presumption of arbitrability applies, and (2) as an unmistakable agreement to arbitrate arbitrability.

> Nothing in the NASD Code removes [Rule 10304] from the ambit of [Rule 10324]. As the Eighth Circuit recently held . . .:
>
> > [T]he parties' adoption of . . . [Rule 10324] is a "clear and unmistakable" expression of their intent to leave the question of arbitrability to the arbitrators. In no uncertain terms, [Rule 10324] commits interpretation of all provisions of the NASD Code to the arbitrators. Reading the NASD

> Code . . . as a whole, we see no reason not to apply [Rule 10324] to the arbitrators' decision regarding the application of [Rule 10304].

PaineWebber, Inc. v. Bybyk, 81 F.3d 1193, 1202 (2d Cir. 1996) (*quoting FSC Sec. Corp. v. Freel*, 14 F.3d 1310, 1312-13 (8th Cir. 1994)).

The Iowa Supreme Court found against Smith Barney that Rule 10324 empowers arbitrators to decide six-year issues. "[Rule 10324] . . . clearly and unambiguously commits the interpretation and application of all of its provisions to the arbitrator. Nothing in the contract language provides a basis for excepting [Rule 10304] from that directive." *Smith Barney, Inc. v. Keeney*, 570 N.W.2d 75, 78 (Iowa 1997). Many other courts have reached the same conclusion.[6] The decision below conflicts with these decisions.

NASD Rule 10106 likewise provides that "[n]o party shall during the arbitration of any matter, prosecute or commence any suit, action, or proceeding against any other party touching upon any of the matters referred to arbitration." Moreover, Harvey and Smith Barney expressly agreed seven times that they were "waiving their right to seek remedies in court." These provisions further support the conclusion that arbitrators, not courts, should resolve six-year issues.

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[6] *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Havird*, 518 S.E.2d 48, 50 (S.C. Ct. App. 1999) ("Rule 10324 . . . clearly and unambiguously prescribes that the arbitrator is to decide the applicability of the provisions of the NASD Code."); *Mid-State Sec. Corp. v. Edwards*, 706 A.2d 773, 776 (N.J. Super. Ct. App. Div. 1998); *Shahan v. Staley*, 932 P.2d 1345, 1348 (Ariz. Ct. App. 1996) ("In no uncertain terms, [Rule 10324] commits interpretation of all provisions of the NASD Code to the arbitrators."); *Smith Barney, Inc. v. Bardolph*, 509 S.E.2d 255, 259 (N.C. Ct. App. 1998); *Smith Barney, Inc. v. Painters Local Union No. 109 Pension Fund*, 579 N.W. 2d 518, 526 (Neb. 1998); *Smith Barney Shearson Inc. v. Sacharow*, 689 N.E.2d 884, 888 (N.Y. 1997); *Weston Sec. Corp. v. Aykanian*, 703 N.E.2d 1185, 1191 (Mass. App. Ct. 1998).

E. The Decision Below Conflicts With Decisions which Treat the NASD Code of Arbitration Procedure as a Consistent Whole.

The decision below relied on an earlier decision refusing to apply Rule 10324 because it was merely "general." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cohen*, 62 F.3d 381, 384 (11th Cir. 1995). *Cohen*'s reasoning, however, contradicts *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995), because it violates a "cardinal principle of contract construction: that a document should be read to give effect to all its provisions and to render them consistent with each other." *Id.* at 63. *Mastrobuono* made this ruling while interpreting an arbitration agreement for Smith Barney's predecessor firm, Shearson Lehman Hutton ("Shearson"), virtually identical to the seven arbitration agreements between Shearson and Petitioner Harvey.

The Iowa Supreme Court adopted this principle against Smith Barney when the court interpreted Rule 10304 in the context of all of the NASD's arbitration rules. "The interpretation that gives a reasonable, lawful, and effective meaning to all terms is preferred to an interpretation that leaves a portion of the agreement of no effect." *Smith Barney, Inc. v. Keeney*, 570 N.W.2d 75, 78 (Iowa 1997). Treating the NASD Code of Arbitration Procedure as a whole, the Court found that Rules 10304 and 10324 were best harmonized by treating six-year issues as within the scope of the arbitration obligation. *Id.*

The Nebraska Supreme Court likewise found against Smith Barney that Rules 10304 and 10324 were not in "conflict; the two sections address different issues." *Smith Barney v. Painters Local Union No. 109 Pension Fund*, 579 N.W.2d 518, 526 (Neb. 1998). "We are persuaded that the entire client agreement, viewed as a whole, including the incorporation of the arbitration code, means considering [Rule 10324] of the

code in conjunction with [Rules 10101 and 10304] thereof and that time-bar issues are therefore arbitrable." *Id.*

The decision below conflicts with these decisions.

F. The Decision Below Conflicts With Decisions Holding that, When Broad Arbitration Obligations Exist, Only Forceful Evidence will Exclude a Claim From Arbitration.

The requirement to resolve all doubts in favor of arbitration is particularly strong in this case, because Harvey and Smith Barney broadly agreed seven times to arbitrate "any controversy," and NASD Rule 10301(a) required Smith Barney to arbitrate "any dispute" upon its customers' demand. Only forceful evidence can remove claims from these broad arbitration obligations.

> [A] presumption [of arbitrability] is particularly applicable where the clause is as broad as the one employed in this case, which provides for arbitration of "any differences . . . ." In such cases, "[i]n the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail."

AT&T Tech., Inc. v. Communications Workers of Am., 475 U.S. 643, 650 (1986) (*quoting Steelworkers v. Warrior & Gulf Navigation* Co., 363 U.S. 574, 584-85 (1960))

This Court considered this issue in *International Union of Operating Engineers v. Flair Builders, Inc.*, 406 U.S. 487, 491 (1972), when a party sought a judge's ruling on whether arbitration claims were untimely under the laches doctrine.

> [T]he parties did in fact agree to arbitrate the issue of laches here. . . . [T]he company was bound by the memorandum agreement to arbitrate labor disputes within the limits of the arbitration clause. That clause applies to "any difference," whatever it may be . . . [W]e must conclude that the parties meant what they said – that "any difference" which would include the issue of laches raised by Respondent at trial, should be referred to the arbitrator for decision. The District Court ignored the plain meaning of the clause in deciding that issue.

The Second Circuit similarly found that the meaning of a brokerage firm's arbitration agreement was "plain indeed: any and all controversies are to be determined by arbitration. The wording is inclusive, categorical, unconditional and unlimited." *PaineWebber Inc. v. Bybyk*, 81 F.3d 1193, 1199 (2d Cir. 1996). "The words 'any and all' are elastic enough to encompass disputes over whether a claim is timely" under NASD Rule 10304. *Id.* "[N]o draftsman seeking a six-year limitation on the scope of arbitrability would craft this language to accomplish that objective." *Id.* at 1200.

The decision below conflicts with these cases by failing to recognize and apply the strong presumption of arbitrability applicable to broad arbitration obligations.

G. The Decision Below Conflicts with the NASD's and the SEC's Intent to Provide Investors With a Speedy and Inexpensive Procedure for Resolving Disputes.

When courts interpret the scope of an arbitration obligation, the intentions underlying the obligation control, "but those intentions are generously construed as to issues of arbitrability." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985). Here, the Securities

and Exchange Commission ("SEC") reviews and approves NASD rules to ensure compliance with the statutory mandate that these rules "protect investors and the public interest." 15 U.S.C. § 78o-3(b)(6). *See Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 233 (1987) ("No proposed arbitration rule change may take effect unless the SEC finds that the proposed rule is consistent with the requirements of the Exchange Act."). The NASD and the SEC said when the NASD arbitration rules were adopted that "[t]he stated purpose of this proposal is to provide investors with a simple and inexpensive procedure for resolution of their controversies with broker-dealers." *Notice of Filing a Proposed Rule Change by NASD, Inc.*, 18 S.E.C. Docket 1372, 1979 WL 16679 at *1 (Dec. 14, 1979).

Contradicting this purpose, the Eleventh Circuit openly asserts that a court's task in assessing arbitrability under Rule 10304 will "not be a simple one." *Kidder, Peabody & Co. v. Brandt*, 131 F.3d 1001, 1005 (11th Cir. 1997). To decide this issue, the Eleventh Circuit requires courts to "go beyond the allegations of the complaint," hold a "mini-trial," and "examine the evidence the parties offer, if any." *Id.*

Hundreds of court cases have considered six-year issues, and the number of court cases would have been exponentially greater if three-quarters of the jurisdictions had not disallowed court litigation of these issues. Here, the parties have litigated for more than four years in three jurisdictions and eight separate court proceedings, in addition to their arbitration. Supposing that the NASD and the SEC intended to allow brokerage firms repeatedly to engage in time-consuming and expensive court litigation over run-of-the-mill timeliness issues is inconceivable, when the intent underlying the NASD arbitration rules is to "protect investors" and provide "simple and inexpensive" dispute resolution.

The Eleventh Circuit's construction of Rule 10304 conflicts with the purpose of the NASD arbitration rules and this Court's requirement that the intent underlying an arbitration obligation controls its interpretation.

H. The Decision Below Conflicts with This Court's Decision to Construe Shearson Arbitration Agreements against the Drafter.

In *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995), this Court construed a Shearson arbitration agreement substantially identical to the Shearson arbitration agreements signed by Petitioner Harvey. This Court found that disputes about punitive damages were arbitrable under NASD rules, because Shearson could not "overcome the common-law rule of contract interpretation that a court should construe ambiguous language against the interest of the party that drafted it." *Id.* at 62. Here, the arbitration agreements called for arbitration of all disputes and precluded seeking remedies in court. The Eleventh Circuit, however, did not construe these agreements against Smith Barney and instead held that some disputes were not arbitrable, and Smith Barney could seek remedies in court. The decision below conflicts with *Mastrobuono* by failing to recognize and apply a presumption against Shearson as the drafter of the agreements.

I. The Decision Below Conflicts with New York Law That Six-Year Issues Are for the Arbitrators.

Each of Harvey's seven customer agreements included a New York choice-of-law provision in the same paragraph as the arbitration agreement. New York's highest court has ruled against Smith Barney that Rule 10304 issues are for the arbitrators, not the courts to decide. *Smith Barney Shearson Inc. v. Sacharow*, 689 N.E.2d 884, 887 (N.Y. 1997). In *Mastrobuono*, this Court did not apply New York law against the arbitrators' authority to award punitive damages, because, "[a]t most, the

[New York] choice-of-law clause introduces an ambiguity into an arbitration agreement [to arbitrate 'any controversy'] that would otherwise allow punitive damages awards." 514 U.S. at 62. Here, by contrast to *Mastrobuono*, Harvey's broad agreements to arbitrate "any controversy" are fully consistent with the New York choice-of-law provisions. Unlike *Mastrobuono*, the New York choice-of-law provisions provide clarity, not ambiguity. The decision below conflicts with the very New York law which Smith Barney, a New York resident, agreed to follow when it drafted the choice-of-law provisions in Harvey's arbitration agreements.

J. The Decision Below Conflicts with the Second Circuit's Decision That Rule 10304 is Not Incorporated Into a Brokerage Firm Customer Arbitration Agreement.

As an alternate holding, the Second Circuit in *PaineWebber Inc. v. Bybyk*, 81 F.3d 1193, 1201 (2d Cir. 1996), held that courts could not enforce Rule 10304 against an investor, because the NASD was only one of several fora before which the investor could choose to arbitrate. Consequently, the court found that Rule 10304 was not incorporated into the arbitration agreement. "[N]o one could tell with certainty which forum would be designated or which set of rules would govern in the event of a dispute." *Id.* Similarly, Harvey's arbitration agreements provided a choice of arbitration fora. The Eleventh Circuit's decision to enforce Rule 10304 against Petitioner Harvey conflicts with *Bybyk*'s holding that courts cannot enforce Rule 10304 when the NASD is only one of several possible arbitration fora.

This Court should grant certiorari to resolve these numerous conflicts.

II. The Decision Below Conflicts With Numerous Cases Interpreting the Six-Year Rule to Allow Claims Substantially Identical to Those of the Petitioners.

Even assuming that the Eleventh Circuit's minority position is correct that courts, not arbitrators, properly interpret NASD Rule 10304, the decision below nevertheless conflicts with numerous decisions expressly allowing arbitration of claims substantially identical to those of the Petitioners. These conflicts are an independent basis for this Court to accept certiorari review.

A. The Decision Below Conflicts With Decisions of This Court and the Third Circuit Requiring a Presumption of Arbitrability.

Petitioners have previously explained that, when arbitration obligations exist as they do in this case, courts must presume arbitrability when determining the obligation's scope. In view of this presumption, the Third Circuit in *PaineWebber Inc. v. Hofmann*, 984 F.2d 1372, 1381 (3d Cir. 1993), found that "the court should, as a benchmark, generally accept a party's statement as to what constitutes a cause of action and permit the arbitration of that claim" under Rule 10304.

The decision below, however, uses its own arbitrability test to determine the scope of the NASD arbitration rules. According to this decision, because the Petitioners' "claims could have withstood a [Federal Rule of Civil Procedure] 12(b)(6) motion to dismiss more than six years prior to their filing an arbitration complaint, Appellants are precluded from arbitrating their dispute under Section 10304 of the NASD Code."[7] App. at 7a. This new test does not presume

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[7] Under the curious logic of this test, a non-frivolous claim is barred as untimely if it was viable more than six years before filing, but a frivolous claim that was never viable will never be time-barred.

arbitrability and is not this Court's test adopted in *Hofmann*. Instead, it in effect applies a presumption against arbitration by requiring investors to establish that their claims could not have withstood a 12(b)(6) motion to dismiss six years earlier. The Eleventh Circuit substantially erred by using this new test which conflicts with this Court's case law.

B. The Decision Below Conflicts With This Court's Precedents by Applying a Merits-Related Test for Arbitrability.

This Court in *John Wylie* determined that arbitrators, not courts, should interpret time-bars in arbitration agreements, in large part because procedural timeliness issues would often be inextricably bound in the merits of the parties' disputes. "Doubts whether grievance procedures . . . have been followed or excused, or whether the unexcused failure to follow them avoids the duty to arbitrate cannot ordinarily be answered without consideration of the merits of the dispute which is presented for arbitration." *John Wiley & Sons v. Livingston*, 376 U.S. 543, 557 (1964). This principle that arbitrators, not courts, should resolve the merits of the parties' disputes is fundamental to this Court's arbitration jurisprudence. "[I]n deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims." *AT&T Tech., Inc. v. Communications Workers of Am.*, 475 U.S. 643, 649 (1986).

The Eleventh Circuit's test for arbitrability under Rule 10304, however, requires courts to determine when a "claim is viable" under Rule 12(b)(6), App. at 7a, and it therefore requires courts to decide merits-related issues. Under this test, courts must separate investors' allegations into legal causes of action, make findings about the facts underlying these causes of action, and decide whether and when these causes of action were viable. This fact-finding and legal analysis necessarily requires courts to make numerous merits-related decisions

about both the facts and the law. Indeed, the Tenth Circuit even openly states that concerns about whether district courts will become "embroiled in the merits of the claim" in deciding six-year issues are "irrelevant." *Cogswell v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 78 F.3d 474, 481 (10th Cir. 1996).

Although the Eleventh Circuit asserted below that the district court did not "delv[e] into the merits of the action," App. at 7a, this assertion is belied by what the district court did. The district court, for example, rejected the Petitioners' federal RICO claim pursuant to 18 U.S.C. § 1964(c) because, on the merits, "it does not exist as a matter of law . . . [and] should not be submitted to the arbitrators." App. at 22a.[8] The court likewise found factually on the merits that the Petitioners' accounts were not discretionary, Smith Barney had no continuing duty to advise its clients of relevant information, and the Petitioners' monthly statements were not misleading. App. at 23a-24a. Thus, both the Eleventh Circuit's test for arbitrability and the district court's actual legal and factual findings conflict with this Court's admonition that courts may not decide merits-related issues when they determine the scope of an arbitration agreement.

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[8] The district court ruled that a statutory amendment eliminating securities fraud as a predicate act for RICO claims applied retroactively. All three Circuits to consider the question, however, have decided that this amendment does not apply retroactively. *Fujisawa Pharmaceutical Co. v. Kapoor*, 115 F.3d 1332, 1337-38 (7th Cir. 1997); *Mathews v. Kidder, Peabody & Co.*, 161 F.3d 156 (3d Cir. 1998); *Scott v. Boos*, 215 F.3d 940 (9th Cir. 2000).

C. The Decision Below Conflicts with Other Decisions, the NASD's Own Views, and the Plain Language of Rule 10304 by Holding That Discovery and Continuing Fraud Cannot be Events within the Six-Year Time Period.

The courts below rejected Petitioners' contentions that discovery, continuing fraud, and fraudulent concealment could be occurrences or events giving rise to their disputes. App. at 8a, 23a-24a. Neither the Eleventh Circuit nor the district court, however, justified this ruling through analysis of Rule 10304, and similar pronouncements by other courts equally lack supporting argument. *See, e.g., PaineWebber Inc. v. Hofmann*, 984 F.2d 1372, 1381 (3d Cir. 1993) (no analysis or supporting argument); *Ohio Co. v. Nemecek*, 98 F.3d 234, 237 (6th Cir. 1996) (no analysis except the irrelevant statement that six years "is more generous than comparable periods allowed under either state or federal securities law").

The NASD itself, however, believes that discovery and fraudulent concealment can be events within the six-year time period. The NASD Director of Arbitration stated in deposition that NASD arbitrators may properly consider allegations of discovery and fraudulent concealment under NASD Rule 10304. Courts have relied on NASD staff determinations that take the same position. *FSC Sec. Corp. v. Freel*, 811 F. Supp. 439, 444 & n.6 (D. Minn. 1993), *aff'd*, 14 F.3d 1310 (8th Cir. 1994) (quoting NASD staff decision that "it is equally appropriate that the discovery by the claimant be treated as the occurrence or event giving rise to the dispute"); *Goldberg v. Parker*, [1995 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 98,749, 1995 WL 396568 at *4 (N.Y. Sup. Ct. April 12, 1995), *aff'd*, 634 N.Y.S.2d 81 (App. Div. 1995) (same).

Courts defer to a self-regulatory organization's interpretation of its own rules. These rules are "primarily" interpreted "on the basis of the construction which the

exchanges that adopted the rules gave to them. A court is not free to regard the problem as a statutory interpretation issue of first impression." *Case & Co. v. Board of Trade*, 523 F.2d 355, 363 (7th Cir. 1975) (*quoting Moses v. Burgin*, 445 F.2d 369, 382 (1st Cir. 1971)). Courts must pay the same deference to the NASD's view that discovery and fraudulent concealment can be events within the six-year window of NASD Rule 10304.

This Court has likewise said that lack of discovery and fraudulent concealment prevent limitations periods from running in federal courts.

> [T]his Court long ago adopted as its own the old chancery rule that where a plaintiff has been injured by fraud and "remained in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party."

Holmberg v. Armbrecht, 327 U.S. 392, 396-97 (1946) (*quoting Bailey v. Glover*, 21 Wall. 342, 348, 22 L. Ed. 636 (1874)). *Holmberg* read "[t]his equitable doctrine . . . into every federal statute of limitation." *Id.* at 397. No reason exists not to apply this same doctrine to Rule 10304.

Rule 10304's text supports the conclusion that discovery and fraudulent concealment are relevant events within the six-year period. Under the text of the Rule, the six-year period begins, not with events giving rise to a "cause of action" which in some jurisdictions might accrue prior to discovery, but instead with events giving rise to the "dispute" or "controversy." A dispute is a "debate, controversy, or difference of opinion . . . a wrangling argument; quarrel," while a controversy is a "prolonged public dispute, debate, or

contention; . . . strife, or argument." *Random House Webster's Unabridged Dictionary*, 443, 569 (2d ed. 1998). Plainly, "a wrangling argument" or "prolonged public dispute" does not exist when one side of the alleged public dispute does not know about it. The most natural reading of Rule 10304 is that an investor's discovery of the wrong gives rise to the dispute or controversy, because a dispute or controversy by definition does not exist before that time.

The decision below rejecting discovery as an event within the six-year rule conflicts with other courts' decisions, the NASD's own views, and the plain language of the Rule.

D. The Decision Below Conflicts with Decisions That Investors Seeking to Arbitrate Statutory Claims under Self-Regulatory Organization Rules Do Not Forgo Substantive Rights.

In *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987), this Court granted Shearson's request to compel arbitration of investors' federal securities law and federal RICO claims. This Court found that, "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Id.* at 229-30 (*quoting Mitsubishi Motors Corp. v. Soler-Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)). In particular, this Court found that the investors could "effectively vindicate their RICO claim in an arbitral forum." *Id.* at 242.

In this instance, Petitioners brought a federal RICO claim subject to a four-year limitations period. *Agency Holding Corp. v. Malley-Duff & Assoc.*, 483 U.S. 143, 156 (1987). Moreover, "[f]ederal courts . . . generally apply a discovery accrual rule when a statute is silent on the issue, as civil RICO is here." *Rotella v. Wood*, 528 U.S. 549, 555 (2000). Harvey also purchased limited partnerships in his employee benefit plan,

which was subject to the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1003(a). ERISA allows actions in the case of fraud or concealment to commence six years after discovery. 29 U.S.C. § 1113.

By disallowing discovery and other "tolling" arguments as events within Rule 10304's six-year period, the decision below conflicts with *McMahon*'s statement that investors will not lose statutory rights by signing brokerage firm arbitration agreements. Because the ERISA and RICO limitations periods are six and four years from discovery, timely claims in court are barred in NASD arbitration if discovery is not an arbitrable event under Rule 10304. For this reason, the Fifth Circuit found that ERISA claims involving Smith Barney were not subject to the six-year rule. *Kramer v. Smith Barney*, 80 F.3d 1080, 1085 (5th Cir. 1996) ("Because application of the [the six-year rule] to render [the investor's] ERISA claims ineligible for arbitration would impair his substantive rights, we hold it void with respect to those claims.").

The decision below conflicts with these decisions.

E. The Decision Below Conflicts with Decisions that a Claim Accrues When Damages are Sustained.

In Florida (the forum state) and California and Indiana (the Petitioners' states of residence), a claim accrues when damages are sustained.[9] Furthermore, the affidavit of

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[9] *See Penthouse North Ass'n v. Lombardi*, 461 So. 2d 1350 (Fla. 1984) (Cause of action for breach of fiduciary duty in 1966 accrued when damages materialized in 1981.); *Martin v. Richey*, 711 N.E.2d 1273, 1279 (Ind. 1999) (striking medical malpractice limitation statute as unconstitutional, because it had run before the plaintiff discovered her injury); *United States Liability Ins. Co. v. Haidinger-Hayes, Inc.*, 463 P.2d 770, 776 (Cal. 1970) ("[T]he statute did not begin to run until damage had occurred . . . .").

Harvey's securities expert concluded that Harvey did not suffer damages until 1994 or 1995 at the earliest when his distributions dropped, within the six-year period. The decision below that a drop in distributions cannot be an event within Rule 10304's time frame conflicts with the decisions of the relevant states.

F. The Decision Below Conflicts With Decisions That Affirmative Advice Not to Sell is an Event Within the Six-Year Rule.

Harvey presented evidence below that Smith Barney told him during the six-year period not to sell his limited partnerships. Courts have held that affirmative advice not to sell a security within the six-year period is an arbitrable event under Rule 10304. *J.E. Liss & Co. v. Levin*, 201 F.3d 848, 852 (7th Cir. 2000) (Arbitration award was confirmed despite Rule 10304, because the "allegation [was] of an independent fraud designed . . . to dissuade [investor] from selling his investment."); *Prudential Sec., Inc. v. Kucinski*, 947 F. Supp. 462, 467 (M.D. Fla. 1996) (Allegation that Prudential convinced the investors to hold stock for eight years was arbitrable under Rule 10304.); *see also Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 744 (1975) ("[I]t has long been established in the ordinary case of deceit that a misrepresentation which leads to a refusal to purchase or to sell is actionable in just the same way as a misrepresentation which leads to the consummation of a purchase or a sale."). The decision below conflicts with these decisions that affirmative advice not to sell is an arbitrable event within the six-year rule.

G. The Decision Below Conflicts With Other Decisions by Holding That Petitioners' Other Claims Were Not Timely.

Petitioners raised numerous other claims that courts have held are arbitrable under Rule 10304. For example, Smith

Barney sent monthly statements to Harvey during the six-year period which, while stating that the face amounts listed for Harvey's investments did not necessarily reflect current market value, did affirmatively suggest that the overall value was not significantly different from the listed value for the investments of more than one million dollars. Distributions from these limited partnerships were listed as income, rather than a return of capital, and the annual return of principal from the limited partnerships was only $54.30 while the income was $83,438.58. The most plausible reading of these misleading statements was that Harvey's principal investment was not being eroded. In *Osler v. Ware*, 114 F.3d 91, 93 (6th Cir. 1997), the court said that misleading monthly statements about portfolio investment value are arbitrable events under the six-year rule.

Similarly, in *Smith Barney Inc. v. Vogele*, 967 F. Supp. 165, 171 (E.D. Va. 1997), the court held against Smith Barney that investors' claims for withholding information, not disclosing fiduciary conflicts, and not monitoring, supervising, and reviewing their accounts, were events or occurrences within the six-year period. In *Prudential Sec., Inc. v. Kucinski*, 947 F. Supp. 462, 467 (M.D. Fla. 1996), allegations of negligent supervision and continued breaches of fiduciary duty were arbitrable under NASD Rule 10304. In *Merrill Lynch, Pierce, Fenner & Smith v. Masland*, 896 F. Supp. 396, 399 (M.D. Pa. 1995), claims for "breach of fiduciary duty for failing to disclose the risk of the limited partnership investments, and through concealment of the true market value of the investments," were viable under Rule 10304. In *PaineWebber Inc. v. Hofmann*, 984 F.2d 1372, 1381 (3d Cir. 1993), claims for a breach of duty "to inform [customers] of a broker's wrongdoing or of the unsuitably speculative nature of their investments" were valid. Petitioners made all of these claims approved in *Vogele*, *Kucinski*, *Masland*, and *Hofmann*, but the Eleventh Circuit rejected them. The decision below conflicts with these cases.

In sum, even assuming that the Eleventh Circuit is correct that courts, not arbitrators, should interpret Rule 10304, the decision below repeatedly conflicts in numerous respects with other courts' decisions. This Court should therefore grant the Writ of Certiorari.

III. The Decision Below Conflicts With Decisions that Being Required to Undergo an Arbitration Which May Later be Set Aside is not Irreparable Injury.

The "requirements for the issuance of a permanent injunction are 'the likelihood of substantial and immediate irreparable injury and the inadequacy of remedies at law.'" *Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486, 1495 (9th Cir. 1996) (citations omitted). Here, by affirming the issuance of a permanent injunction, the Eleventh Circuit necessarily found that Smith Barney would suffer irreparable injury without the injunction and did not have an adequate remedy at law.

Courts uniformly hold, however, that the costs and expense of an arbitration which may later be set aside do not constitute irreparable injury.[10] The Seventh Circuit held in a case involving NASD Rule 10304 that the "ordinary incidents of litigating (or arbitrating) a case are not 'irreparable injury.'" *PaineWebber Inc. v. Farnam*, 843 F.2d 1050, 1051-53 (7th Cir. 1988); *see also PaineWebber Inc. v. Farnam*, 870 F.2d 1286 (7th Cir. 1989). Smith Barney additionally had an adequate remedy

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[10] *Stateside Machinery Co. v. Alperin*, 526 F.2d 480, 483-84 (3d Cir. 1975) ("[T]he harm which may result from denial of the motion [to stay arbitration] hardly seems irreparable. . . . If the arbitrators decide more than the contract that the parties committed to them the court in a subsequent enforcement proceeding will afford judicial review."); *Emery Air Freight Corp. v. Local Union 295*, 786 F.2d 93, 100 (2d Cir. 1986) ("[A]rbitration by itself imposes no [irreparable] injury to the resisting party . . . . The monetary cost of arbitration certainly does not impose such a legally recognized irreparable harm.").

at law in the California state court, and it could always have obtained a hearing there in less than three weeks. Cal. Code Civ. P. § 1005(b).

In *PaineWebber Inc. v. Hartmann*, 921 F.2d 507, 514-15 (3d Cir. 1990), the Third Circuit said that requiring a brokerage firm to arbitrate claims not eligible under Rule 10304 is "*per se* irreparable," because the Federal Arbitration Act requires courts to decide arbitrability. That a party may be entitled to a judicial ruling, however, does not mean that failing to obtain this ruling immediately is irreparable injury. In addition, conspicuously absent from the FAA is any provision for staying an ongoing arbitration. When a statute does not mention a particular remedy, courts conclude that Congress intended not to allow that remedy. *See Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993) ("*Expressio unius est exclusio alterius.*").

The decision below conflicts with cases holding that being required to undergo an arbitration which may later be set aside does not constitute irreparable injury.

IV. The Decision Below Conflicts With Decisions Requiring Appointment of a Guardian for Thomas.

The Eleventh Circuit found no error in the district court's decision to render summary judgment against Petitioner Thomas even though she was incompetent, had requested a guardian, had not yet submitted evidence, and had not yet responded to Smith Barney's summary judgment motion. In similar circumstances, however, the court said in *Gardner v. Parson*, 874 F.2d 131, 141 (3d Cir. 1989), that, "[b]ecause [the child] was without a representative when the court dismissed her claims, and was otherwise unprotected, the court was without authority to reach the merits of those claims."

Although the magistrate granted Thomas' motion for appointment of a guardian, Thomas timely objected to the magistrate's requirement that she pay this guardian from her own funds. She also timely moved for an extension of time to respond to Smith Barney's summary judgment motion until the guardianship issue was resolved. She could not select a guardian until resolution of this issue, because whether she would be able to afford a professional guardian or would instead ask her daughter to serve at no charge depended on whether Smith Barney was required to pay the guardian. The district court's failure to appoint a legal representative for Thomas and decision to enter judgment before she had even responded to Smith Barney's summary judgment motion was manifest error.

V. Conclusion

For the reasons stated, this Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

Stephen Krosschell, Esq.
Counsel of Record
Joel A. Goodman, Esq.
Goodman & Nekvasil, P.A.
14020 Roosevelt Blvd., Suite 808
P.O. Box 17709
Clearwater, Florida 33762
(727) 524-8486
Attorneys for Petitioners

APPENDIX A

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed August 9, 2001]

No. 00-12627

D.C. Docket No. 99-08549-CV-WPD

SALOMON SMITH BARNEY, INC.,

Plaintiff-Appellee,

versus

ARTHUR HARVEY, M.D., individually, and as beneficiary of the Arthur Harvey, M.D. Inc. Employee Defined Benefit Plan,
DELORES E. THOMAS,

Defendants-Appellants,

MARGARET G. OSTRANDER,

Defendant.

Appeal from the United States District Court
for the Southern District of Florida

Before TJOFLAT and DUBINA, Circuit Judges, and SHAPIRO*, District Judge.

*Honorable Norma L. Shapiro, U.S. District Judge for the Eastern District of Pennsylvania, sitting by designation.

DUBINA, Circuit Judge:

The central issue in this appeal concerns the propriety of a district court's review of the timeliness of claims sought to be arbitrated pursuant to the National Association of Securities Dealers Code of Arbitration. Because the extent of a court's review is clearly articulated in both *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cohen*, 62 F.3d 381 (11th Cir. 1995), and *Kidder Peabody & Co., Inc., v. Brandt*, 131 F.3d 1001 (11th Cir. 1997), we hold that the district court properly analyzed whether the alleged claims were timely for purposes of arbitration; accordingly, we affirm.

I. FACTS AND PROCEDURAL HISTORY

Between 1985 and 1990, appellants Delores Thomas, Margaret Ostrander, and Arthur Harvey (collectively referred to as "Appellants") purchased limited partnerships through Salomon Smith Barney Inc. ("Smith Barney"). On or about July 22, 1997, the Appellants filed an amended Statement of Claim and joined a Florida arbitration proceeding before the National Association of Securities Dealers ("NASD") that was initially filed by a claimant who is not a party to this suit. Appellants filed another NASD Statement of Claim on or about May 12, 1998. The arbitration claim alleged that Smith Barney recommended the purchase of investments in limited partnerships that were unsuitable and inappropriate for the investment objectives of the Appellants.

Since the individual Appellants resided in different states and made different investments with Smith Barney, Smith Barney requested that the NASD sever the claims. On November 14, 1997, the NASD Director of Arbitration granted the request to sever, but the NASD arbitration panel, at the Appellants' urging, reconsidered the matter and disregarded the Director's ruling by permitting the separate claims to proceed as one arbitration in Florida.

Simultaneous with the filing of the amended NASD claim, Appellants filed a state court action in Broward County, Florida. Appellants sought a declaration that the NASD panel, not the courts, should rule on the six-year eligibility requirement articulated in the NASD Code of Arbitration. In response, Smith Barney moved to sever the claims against it and/or dismiss the action on grounds of *forum non conveniens*. The trial judge denied Smith Barney's motion to sever and/or dismiss, and Smith Barney appealed that order to the Florida Fourth District Court of Appeal ("4th DCA"). On January 20, 1999, the Florida 4th DCA concluded that the Appellants engaged in impermissible forum shopping, dismissed Appellants' claims, and directed the trial court to enter orders to ensure that the Appellants could reinstate their suit in an alternative forum. *Smith Barney v. Potter*, 725 So. 2d 1223, 1226-27 (Fla. 4th DCA 1999).

In light of the Florida appellate court's ruling in *Potter*, Smith Barney again petitioned the NASD arbitration panel to sever the arbitration. On March 25, 1999, the panel again denied Smith Barney's motion to sever.

Back in October of 1997, in anticipation of an NASD ruling to sever the claims, Smith Barney filed a complaint with the state court in California, where it believed that Appellant Harvey's claims would have to be arbitrated once the NASD severed them. Smith Barney requested declaratory and injunctive relief staying the underlying arbitration as to Appellant Harvey until the California court had an opportunity to determine which of Harvey's claims, if any, were eligible for arbitration. Appellant Harvey, however, moved to stay the California proceeding in light of the similar proceeding in Florida already underway. The California court granted Harvey's motion and deferred to the pending Florida action.

On July 14, 1999, Smith Barney filed this action in the Southern District of Florida for declaratory and injunctive relief to enjoin Appellants from arbitrating claims that are ineligible for arbitration under the NASD's six-year eligibility rule. The district court granted a preliminary injunction, and on appeal, we dismissed the case as moot because the district court had subsequently entered an order granting permanent injunctive relief.

On February 28, 2000, Appellant Thomas filed a motion for appointment of a guardian ad litem at Smith Barney's expense. Appellant Thomas was 76 years old at the time, and her treating physician completed an affidavit attesting to her incompetency. Smith Barney objected to paying the expenses of a guardian. A magistrate judge granted Thomas's request for appointment of a guardian ad litem but denied her request that such appointment be at Smith Barney's expense. Appellant Thomas objected to the magistrate's order.

Smith Barney and Appellants filed cross-motions for summary judgment, each contesting whether Appellants' claims were eligible for arbitration. The district court granted Smith Barney's motion for summary judgment and denied all other pending motions as moot, including Appellant Thomas' motion for an appointment of a guardian ad litem at Smith Barney's expense. This appeal followed.

III. ISSUES

1. Whether the district court properly reviewed the arbitrability of this case.
2. Whether the district court should have been judicially estopped from hearing this case.
3. Whether the district court should have abstained from exercising jurisdiction over this case.
4. Whether the district court committed reversible error by granting summary judgment in favor of Smith Barney prior

to ruling on Appellant Thomas's motion for appointment of a guardian ad litem at Smith Barney's expense.

III. STANDARDS OF REVIEW

This court reviews the district court's order granting permanent injunctive relief under an abuse of discretion standard. *Simmons v. Conger*, 86 F.3d 1080, 1085 (11th Cir. 1996). We review the district court's application of judicial estoppel for abuse of discretion. *Talavera v. School Board of Palm Beach Co.*, 129 F.3d 1214, 1216 (11th Cir. 1997). The district court's legal determinations are reviewed *de novo*. *Kidder, Peabody & Co., Inc. v. Brandt*, 131 F.3d 1001, 1003 (11th Cir. 1997). This court also reviews a district court's order granting summary judgment *de novo*. *Bivens Gardens Office Bldg., Inc. v. Barnett Banks of Fla., Inc.*, 140 F.3d 898, 905 (11th Cir. 1998).

IV. DISCUSSION

It is well settled that the NASD eligibility requirement is a substantive requirement, and, absent clear and unmistakable evidence, the court determines whether claims are timely under the NASD Code. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) ("Courts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so.") (quoting *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 649 (1986)); *see also Dean Witter Reynolds, Inc., v. Fleury*, 138 F.3d 1339, 1342 (11th Cir. 1998) ("[Section] 15 of the NASD Code is not a procedural statute of limitations, but a substantive eligibility requirement, determining the arbitrability of a given claim.").[1]

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[1] The NASD Code was renumbered in 1996, and Section 15 was renumbered Section 10304.

Since the record reflects no clear and unmistakable evidence of the parties' intent to arbitrate issues of arbitrability, we adhere to our admonition in *Cohen* and conclude that "the presumption that courts determine arbitrability" controls. *Cohen*, 62 F.3d at 384. Having determined that the case was properly before the district court, we now turn to the extent of the district court's review of arbitrability and to the propriety of the court's findings.

Section 10304 of the NASD Code provides: "No dispute, claim, or controversy shall be eligible for submission to arbitration under this Code where six (6) years have elapsed from the occurrence or event giving rise to the act or dispute, claim or controversy."

Smith Barney posits that the "occurrences or events" giving rise to Appellants' claims were the purchase dates of the limited partnerships. Conversely, Appellants aver that their claims are based on events that occurred less than six years before they filed their Statement of Claim. Appellants further argue that when the court analyzed and adjudicated their allegations of injuries suffered within the six year period, the district court impermissibly passed upon the very issues that the parties had previously agreed to arbitrate. In other words, the Appellants assert that the district court's review should be limited to resolving the six-year eligibility issue and should not infringe on the parties' agreement to arbitrate the merits of the case.

Although Smith Barney sold the last limited partnership to Appellants over six years prior to the Appellants' filing of their Statement of Claim, Appellants maintain that numerous other arbitrable events or occurrences transpired within six years of submission to arbitration, including: issuance of false monthly statements, failure to disclose that the limited partnership portfolio was losing value, failure to diversify

accounts, affirmative advice not to sell the limited partnerships, etc.

Similar allegations were at issue in *Cohen*. There, we stated that "[i]t is not a foregone conclusion [] that the purchase date is the relevant occurrence or event giving rise to the Cohens' claims." 62 F.3d at 385. Indeed, we remanded the case so that the district court could "examine each of the Cohen's claims in order to determine what is the 'occurrence or event' giving rise to that claim. *Id.* When faced with continuing fraud allegations, the trial court must determine which alleged occurrences or events are necessary to make the claim viable. *See Kidder Peabody & Co., Inc. v. Brandt*, 131 F.3d at 1004. A claim is viable "when all the elements of that claim can be established such that it could withstand a motion to dismiss for failure to state a claim for relief pursuant to Federal Rule of Civil Procedure 12(b)(6)." *Id.* In short, "[i]f the occurrence or event which made the claim viable took place more than six years from the date the defendants filed their arbitration complaint, the claim is ineligible for arbitration." *Id.*

Here, unlike *Cohen*, the district court analyzed the Appellants' allegations that certain events and occurrences fell within the six year eligibility period. The district court explicitly addressed each of the Appellants' claims and found that each claim emanated from the sale of the limited partnerships. Since the Appellants' claims could have withstood a 12(b)(6) motion to dismiss more than six years prior to their filing an arbitration complaint, Appellants are precluded from arbitrating their dispute under Section 10304 of the NASD Code.

The district court did not exceed the scope of its review by delving into the merits of the action, but adhered to our previous exegesis that "the court must go beyond the allegations of the complaint and examine the evidence the

parties offer, if any." *Id* at 1005; *see Cohen* 62 F.3d at 385 ("[O]ur holding may compel federal courts to hold 'mini-trials' on timeliness.").

Moreover, the district court correctly held that the Appellants' continuing fraud claims were tolling arguments, and as such have no effect upon eligibility. *See Cohen*, 62 F.3d at 385 n.4 ("[B]ecause section 15 is an eligibility requirement rather that a procedural statute of limitations, claims are not subject to equitable tolling."); *see also Ohio Company v. Nemecek*, 98 F.3d 234 (6th Cir. 1996); *Edward D. Jones & Co. v. Sorrells*, 957 F.2d 509 (7th Cir. 1992).

Under the facts of this case, we hold that the district court did not abuse its discretion in making its findings nor did the district court improperly pass upon the merits of the case. Rather, the district court correctly analyzed the viability of each claim pursuant to the standards set forth in *Cohen* and *Brandt*.

The Appellants also contend that Smith Barney is bound by the Florida state appellate court's mandate that the issues be litigated in the Appellants' respective states instead of Florida. Having successfully argued that Florida was not the proper forum for this action, Appellants content that Smith Barney should be judicially estopped from subsequently seeking adjudication and redress from a Florida court.

Judicial estoppel "is applied to the calculated assertion of divergent sworn positions . . . [and] is designed to prevent parties from making a mockery of justice by inconsistent pleadings." *McKinnon v. Blue Cross & Blue Shield of Ala.*, 935 F.2d 1187, 1192 (11th Cir. 1991) (citation omitted). This circuit's approach contemplates two elements. First, it must be shown that the allegedly inconsistent positions were made under oath in a prior proceeding. Second, such inconsistencies must be shown to have been calculated to

make a mockery of the judicial system. *See id.; Taylor v. Food World Inc.*, 133 F.3d 1419, 1422 (11th Cir. 1998); *Johnson Service Co. v. Transamerica Ins. Co.*, 485 F.2d 164, 174-175 (5th Cir. 1973).[2]

The district court did not abuse its discretion by refusing to apply judicial estoppel. Smith Barney did not maintain inconsistent positions, but rather it continuously argued that Florida was an inconvenient forum. Only when the arbitration panel refused to sever the action in accordance with the Florida appellate court's holding was Smith Barney relegated to filing in federal court in Florida. Moreover, Appellants failed to show that Smith Barney's decision to file in Florida evinced a calculated attempt to make a mockery out of the judicial system. *See Dockery v. North Shore Medical Center*, 909 F.Supp. 1550, 1558 (S.D. Fla. 1995) ("Judicial estoppel is a technical rule . . . directed against those who would attempt to *manipulate* the court system through the *calculated* assertion of divergent sworn positions in judicial proceedings.") (emphasis added). We conclude that the district court properly refused to apply judicial estoppel in this instance.

Appellants further argue that the district court should have abstained from exercising jurisdiction because the district court sat as a court of equity and the issues had been pending in state court. *See Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 717 (1996) ("[I]t has long been established that a federal court has the authority to decline to exercise its jurisdiction when it is asked to employ its historic powers as a court of equity."). We hold, however, under *Moses H. Cone Memorial Hosp. v. Mercury Contr. Corp.*, 460 U.S. 1 (1982), and *First Franklin Fin.*

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[2] The Eleventh Circuit adopted as binding precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981. *Bonner v. City of Pritchard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

Corp. v. McCollum, 144 F.3d 1362 (11th Cir. 1998), that the district court properly exercised jurisdiction over the present action.

Appellant Thomas separately contends that the district court improperly granted summary judgment to Smith Barney before it granted her motion for appointment of a guardian ad litem at Smith Barney's expense. She claims that she had become incompetent, and before she could respond to Smith Barney's summary judgment motion, she needed a guardian ad litem. Federal Rule of Civil Procedure 17(c) provides, "[t]he court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person." In *Roberts v. Ohio Casualty Ins. Co.*, 256 F.2d 35, 39 (5th Cir. 1958),[3] the Fifth Circuit held that a court addressing a request for a guardian ad litem must either (1) appoint a guardian; (2) issue an order providing whatever protection might be required for the party in lieu of appointing a guardian; or (3) determine that the party is protected absent a guardian. It is clear that *Roberts* and Rule 17(c) require that some action be taken on the record before a court proceeds on the merits of the claims.

The record demonstrates that Appellant Thomas filed a motion for appointment of a guardian ad litem at Smith Barney's expense on February 28, 2000. On March 28, 2000, a magistrate judge granted Thomas's motion for appointment of a guardian ad litem, but the court denied her request that such appointment be at Smith Barney's expense. (Order of Judge Johnson, R. at Docket Entry No. 44.) The ruling further provided that "[t]he parties shall confer and provide the Court with the name of an agreed-upon Guardian Ad Litem within ten (10) days of the date of this Order. If the parties cannot

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[3] *See supra* note 2.

agree, each party shall name a proposed Guardian Ad Litem within ten (10) days, and this Court shall make the selection." *Id.* Although Appellant Thomas filed objections to the magistrate judge's refusal to require that Smith Barney pay for the guardian ad litem, the record does not indicate any attempt by any party to name a guardian ad litem until May 19, 2000, almost a month after the court granted Smith Barney's motion for summary judgment.[4] The district court gave Appellant Thomas the opportunity to obtain a guardian ad litem, but she, herself, delayed selection of a guardian. The district court was therefore justified in rendering summary judgment before naming a guardian ad litem. In our view, the district court complied with the requirements of *Roberts* and Rule 17(c) of the Federal Rules of Civil Procedure by granting Appellant Thomas' initial motion for a guardian ad litem and setting up a mechanism through which she could select a guardian ad litem.

Finally, because Appellants raise their full faith and credit argument for the first time on appeal, we decline to consider it. *See McGinnis v. Ingram Equip. Co., Inc.*, 918 F.2d 1491, 1495 (11th Cir. 1990) (en banc) ("A general principle of appellate review is that an appellate court will not consider issues not presented to the trial court.").

V. CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED.

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[4] It is noteworthy that the district court granted Appellant Thomas' motion to appoint the *named* guardian ad litem on the same day that motion was filed. (R. at Docket Entry Nos. 60, 62.)

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed August 9, 2001]

No. 00-12627-AA

SALOMON SMITH BARNEY INC.,

Plaintiff-Appellee,

versus

ARTHUR HARVEY, M.D., individually, and as beneficiary of the Arthur Harvey, M.D. Inc. Employee Defined Benefit Plan
DELORES E. THOMAS,

Defendants-Appellants,

MARGARET G. OSTRANDER,

Defendant.

On Petition for Hearing En Banc from the United States District Court for the Southern District of Florida

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BEFORE: TJOFLAT and DUBINA, Circuit Judges, and SHAPIRO*, U.S. District Judge.

No Judge in regular service on the Court having requested that the Court be polled on hearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5); the Petition for Hearing En Banc is DENIED.

ENTERED FOR THE COURT:

s/ Gerald Bard Tjoflat
UNITED STATES CIRCUIT JUDGE

* Honorable Norma L. Shapiro, U.S. District Judge, for the Eastern District of Pennsylvania, sitting by designation.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

[Filed April 20, 2000]

CASE NO. 99-8549-CIV-DIMITROULEAS

SALOMON SMITH BARNEY INC.,

Plaintiff,

vs.

ARTHUR HARVEY, M.D., individually, and as beneficiary of the Arthur Harvey, M.D., Inc., Employee Defined Benefit Plan; MARGARET G. OSTRANDER and DELORES THOMAS

Defendants.
_____/

ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

THIS CAUSE is before the Court upon Plaintiff's, Salomon Smith Barney, Inc. Motion for Summary Judgment, filed herein on March 20, 2000 and Defendant's, Arthur Harvey, M.D. Motion for Summary Judgment, filed herein on March 20, 2000. The Court has carefully considered the motions, and is otherwise fully advised in the premises.

I. BACKGROUND

On or about July 22, 1997, Defendants filed a Uniform Submission Agreement and a Statement of Claim with the National Association of Securities Dealers, Inc. ("NASD") against Plaintiff. On or about May 12, 1998, Defendants subsequently filed another NASD Statement of Claim. These claims allege that Plaintiff recommended imprudent investments, purchased by Defendants, beginning in 1985. Several state court suits were filed in Florida and California. The Fourth District Court of Appeals remanded one such state court claim to the trial court granting Plaintiff's claim of *forum non conveniens*. The Court notes that the Plaintiff in the present suit was a Defendant in the state court suit.

Plaintiff filed their two count Complaint, seeking: 1) Injunctive Relief; and 2) Declaratory Judgment.

This Court has previously entered a preliminary injunction enjoining the underlying National Association of Securities Dealers, Inc. ("NASD") arbitration to allow this Court the opportunity to determine the viability of Defendants' claims regarding certain transactions, and whether or not the claims are ineligible pursuant to the NASD's six-year eligibility rule.

Plaintiff filed this Motion for Summary Judgment arguing that all of Defendant's claims arise out of purchases made more than six years before they filed their arbitration claims with the NASD, and therefore their claims are ineligible for arbitration. Defendants filed their Motion for Summary Judgment arguing that this Court should not follow established Eleventh Circuit law and find that all of their claims are arguably arbitrable, and the arbitration panel should be the one deciding which of their claims are viable.

II. DISCUSSION

The Court may grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The stringent burden of establishing the absence of a genuine issue of material fact lies with the moving party. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The Court should not grant summary judgment unless it is clear that a trial is unnecessary. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986), and any doubts in this regard should be resolved against the moving party, *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970).

The movant "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp.*, 477 U.S. at 323. To discharge this burden, the movant must point out to the Court that there is an absence of evidence to support the nonmoving party's case. *Id.* at 325.

After the movant has met its burden under Rule 56(c), the burden of production shifts and the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electronic Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). According to the plain language of Fed. R. Civ. P. 56(e), the non-moving party "may not rest upon the mere allegations or denials of the adverse party's pleadings," but instead must come forward with "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); *Matsushita*, 475 U.S. at 587.

Essentially, so long as the non-moving party has had an ample opportunity to conduct discovery, it must come

forward with affirmative evidence to support its claim. *Anderson*, 477 U.S. at 257. "A mere 'scintilla' of evidence supporting the opposing party's position will not suffice; there must be a sufficient showing that the jury could reasonably find for that party." *Walker v. Darby*, 911 F.2d 1573, 1577 (11th Cir. 1990). If the evidence advanced by the non-moving party "is merely colorable, or is not significantly probative, then summary judgment may be granted." *Anderson*, 477 U.S. 242, 249-50.

The first issue that must be addressed is that of arbitrability. It is settled law that unless there is "clear and unmistakable evidence" of the parties' intent to allow the arbitrator to determine arbitrability questions, this Court, and not the NASD arbitration panel, should determine whether the arbitration of the dispute between Plaintiff and Defendants is time barred by Rule 10304 of the NASD Code of Arbitration Procedure. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cohen*, 62 F.3d 381 (11th Cir. 1995); *see also First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995). It must then be determined when any disputed issues of arbitrability should be heard. The Court must decide which claims are eligible for arbitration prior to the commencement of arbitration. *Cohen*, 62 F.3d 381.

This Court must apply federal law. As stated above, the Eleventh Circuit requires the Court to decide the issues of arbitrability, and to make these determinations prior to arbitration. This Court has jurisdiction because a federal question is involved. *Cohen*, 62 F.3d 381.

The six-year eligibility issue is governed by Rule 10304 of the NASD Code, which provides as follows: "No dispute, claim, or controversy shall be eligible for submission to arbitration under this Code where six (6) years have elapsed from the occurrence or event giving rise to the act or dispute, claim or controversy."

In *Cohen*, 62 F.3d 381, this Circuit addressed the issue whether an arbitration claim is timely under section (10304) of the NASD Code.[5] In *Cohen*, investors filed an arbitration claim alleging that Merrill Lynch sold various investments that were unsuitable for them and that Merrill Lynch then fraudulently concealed the fact that the investments had lost almost 50 percent of their value by reporting false values. The Cohens asserted claims for common law fraud, breach of fiduciary duty, gross negligence, violation of the Florida Securities and Investor Protection Act, and intentional infliction of emotional distress. Merrill Lynch argued that the investments were purchased between 1985 and 1987, more than six years prior to the filing of the arbitration claim, and that the purchases of the investments were the occurrences or events giving rise to the investors' claims.

On appeal, the court rejected Merrill Lynch's argument and held that "[i]t is not a foregone conclusion, however, that the purchase date is the relevant occurrence or event giving rise to the Cohens' claims." *Cohen*, 62 F.3d at 385. The court went on to note that '[i]f the Cohens prove that Merrill Lynch reported false values for their investments through bogus statements, then Merrill Lynch's act of sending the false statements, rather than the initial purchase of the investments, may be the occurrence or event giving rise to their claims." *Id.* (citing *PaineWebber, Inc. v. Hofmann*, 984 F.2d 1372, 1381 (3d Cir. 1993)) (explaining that PaineWebber's active concealment of its wrongdoing can "be viewed as an independent cause of action based on a duty owed by PaineWebber to its customers to inform them of a broker's wrongdoing"). The court then stated that the record on appeal was insufficient to allow them

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[5] As discussed above, Merrill Lynch filed an action seeking to enjoin the arbitration asserting that the claims were time barred. The district court held that the question whether the claims were time-barred was to be decided by the arbitration panel and not the court. On appeal, the court reversed the district court and held that the court was to decide the issue.

to determine whether or not Merrill Lynch perpetrated a continuing fraud on the Cohens. *Id.* at 385 n.5.

The court went on to note that "[w]e express no opinion, however, as to the applicable 'occurrence or event' in a case in which a broker used fraud to procure the sale of securities and then continued to conceal the fraud. If the Cohen's allegations are correct, Merrill Lynch did not merely conceal the fraud, but rather affirmatively misstated the value of the Cohens' investments over a six year period." *Id.* at 385 n.6. The court then remanded the case to the district court to "examine each of the Cohens' claims in order to determine what is the "occurrence or event" giving rise to that claim. The court should then determine if more than six years has elapsed from that event and send any claims that remain viable to arbitration." *Id.* at 385.

In *Kidder Peabody & Co., Inc. v. Brandt*, 131 F.3d 1001 (11th Cir. 1998), the court revisited Rule (10304) of the NASD Code and defined an "occurrence or event" for purposes of establishing a claim. In *Brandt*, the investor filed an arbitration claim asserting various claims including a claim under the Racketeer Influenced Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962, with respect to investments purchased from Kidder Peabody more than six years before the investor filed the arbitration claim. The district court granted in part and denied in part Kidder's motion for summary judgment holding that all of the claims except the RICO claim was time barred. As to the RICO claim, the district court found that the "occurrence or event" giving rise to the RICO claim was a pattern of racketeering and at least a portion of that activity occurred within the six year time period. Therefore, the district court found the RICO claim was eligible for arbitration. Kidder Peabody appealed.

On appeal, the court first held that "under § (10304) the 'occurrence or event' which 'gives rise to the . . . claim' is the

last occurrence or event necessary to make the claim viable. A claim is viable when all the elements of that claim can be established such that it could withstand a motion to dismiss for failure to state a claim for relief pursuant to Federal Rule of Civil Procedure 12(b)(6)." *Id.* at 1004. "Of course, the last 'occurrence or event' necessary to make a claim viable depends on the nature of a particular claim." *Id.* The court then remanded the action to the district court to "consider whether the defendants have proved that Kidder committed acts within the six-year window that caused the defendants injury, and if so, whether those injurious acts created independent RICO causes of action." *Id.* at 1500. The court noted that in examining the claims, "the court must go beyond the allegations of the complaint and examine the evidence the parties offer, if any," and that "it might be necessary for the court to hold a 'mini-trial' to identify the last occurrence or event necessary to make the [investor's] claim or claims viable." *Id.*

Defendants argue that their claims for damages and racketeering injury did not arise until they suffered damages at the earliest at the end of 1994, when the distributions from his portfolio of limited partnerships sharply dropped. Defendants also alleges that numerous other arbitrable events or occurrences occurring within six years of his submission to arbitration, including issuance of false monthly statements, failure to disclose that his limited partnership portfolio was losing value, failure to diversify his accounts, affirmative advice not to sell his limited partnerships, failure to disclose that his broker had made numerous misrepresentations regarding his limited partnerships, continued mischaracterization of his distributions as income rather than a return of capital, failure to disclose conflicts of interest with respect to proprietary partnerships, and failure to supervise.

Defendants in this action, first submitted their claims to the NASD for arbitration on May 5, 1997. The last limited

partnership purchased in a Smith Barney account maintained by Harvey was purchased in August 31, 1990. Affidavit of Fazio at ¶ 9. Plaintiff points out that Defendants' Amended Claim specifically seek damages and interest running from the time of purchase and commissions received from the transactions. Amended Claim at ¶¶ 86, 91, 103, 112, 116. Additionally, the Amended claim relates to point of sale and purchase issues. Count I of the Amended Claim, for breach of contract, is a claim for failure to recommend suitable investments. Amended Claim at ¶ 75. This is a point of sale claim. Count II is a claim for common law fraud. The actions involved in that claim are allegations that Smith Barney misrepresented the true nature of the limited partnerships at issue. For Count II, Defendants seek pre-judgment interest from the date of the purchase of the limited partnerships. Amended Claim at ¶¶ 87-91. This is a point of sale claim. Count III is a claim for breach of fiduciary duty. This claim makes allegations regarding the suitability of the limited partnerships. Amended Claim at ¶¶ 91-103. This is a date of sale claim. Count IV is a claim for negligence and gross negligence. The claim makes allegations regarding the suitability of the limited partnerships at the time Plaintiff recommended them. Additionally, Defendants seek prejudgment interest from the date of purchase. Amended Claim at ¶¶ 104-112. This is a claim from the date of sale. Count V is a claim for unjust enrichment. Defendants seek return of commissions from the time the limited partnerships were purchased. Amended Claim at ¶¶ 113-116. This is a point of sale claim. Count VI is a federal RICO claim. The claim centers on the suitability of the limited partnerships at the time Plaintiff recommended them. Additionally, Defendants seek prejudgment interest from the date of the purchase. Amended Claim at ¶¶ 112, 117-119. This is a date of sale claim.

Plaintiff alleges that many of Defendants' claims are either not viable or are merely claims used to toll the eligibility

requirement date. Plaintiff argues that Defendants' RICO Claim must fail because Congress amended federal RICO to remove claims arising from securities fraud as RICO predicate acts. Specifically, 18 U.S.C. § 1964(c), of the RICO Act, which became effective on December 22, 1995, states: "Any person injured in his business or property by reason of a violation of § 1962(c) of this chapter may sue therefor . . . except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of § 1962." Additionally, Plaintiff submits Congressional records which state:

> The Committee amends § 1964c of Title 18 of the U.S. Code to remove any conduct that would be actionable as fraud in the purchase or sale of securities as a predicate act of racketeering under civil RICO. The Committee intends this amendment to eliminate securities fraud as a predicate act of racketeering in a civil RICO action. In addition, a plaintiff may not plead other specified offenses, such as mail or wire fraud, as predicate acts of racketeering under civil RICO if such offenses are based on conduct that would have been actionable as securities fraud.

S. Rep. No. 98, 104th Cong. 1st Sess. (June 1995) [1995 transfer binder] Fed. Sec. L. Rep. (CCH) ¶ 85.629 at 86.767. Defendants contend that the issue of whether the RICO claim has merit is a question for the arbitrators. This Court, however, must decide which claims are arbitrable. The Amendment to the Federal RICO law was enacted December 22, 1995 and Defendants did not file their claim for arbitration until July 22, 1997. Therefore, Defendants' Federal RICO claim does not state a cause of action because it does not exist as a matter of law, and should not be submitted to the arbitrators.

Plaintiff argues that Defendants' continuing fraud claims are mere tolling arguments. To be actionable, Defendants' claims must allege "genuine, independent causes of action." *Hofmann*, 984 F.2d at 1381. Defendants' claims, however, specifically relate back to occurrences and events which took place prior to, or at the time of the purchases of the limited partnerships. The fraud claims allege Plaintiff's failure to correct prior misrepresentations that aided in the inducement of Defendants purchase of the limited partnerships. Amended Complaint at ¶ 45. Additionally, it is undisputed that the limited partnership purchases were contained in a non-discretionary account. Fazio Affidavit ¶¶ 7, 13. "Normally the agency relationship created by a non-discretionary account arises when the client places an order and terminates when the transaction ordered is complete." *Caravan Mobile Homes Sales, Inc. v. Lehman Bros. Kuhn Loeb, Inc.*, 769 F.2d 561, 567 (9th Cir. 1995); *Robinson v. Merrill Lynch, Pierce, Fenneer & Smith, Inc.*, 337 F. Supp. 107, 111 (N.D. Ala. 1971), *aff'd*, 453 F.2d 417 (5th Cir. 1972). "The stockbroker assumes no continuing obligation to advise his clients of information that affects their securities." *Lehman Bros. Kuhn Loeb, Inc.*, 769 F.2d at 567. Defendants do not assert that Plaintiff represented that it would continue monitoring the accounts. These actions, therefore, are tolling arguments.

Defendants argue that they were continuously deceived by monthly statements which affirmatively misrepresented the value of the investments. The statement listed the limited partnerships which showed that the stated value was the original offering price and not the current market value. Fazio Affidavit at ¶ 20. In *Tourdo*, the Middle District of Florida was faced with facts almost identical to this action. In *Tourdo*, "Plaintiff . . . contends that he was deceived by Defendant's monthly statements that 'falsely reported that the limited partnerships had retained all or most of their principal value." *Tourdo v. Merrill Lynch, Pierce Fenner & Smith, Inc.*, 1996 WL 942866 (M.D. Fla. 1996), *aff'd*, 146 F.3d 870 (11th Cir. 1998).

The monthly statements in *Tourdo* advised the Plaintiff, "[p]lease note that the Limited Partnership prices reflect the initial offering price only and may not represent the Limited Partnership's current value." *Id.* at 5. The language in the statements in *Tourdo* are almost identical to the language used in the monthly statements by Plaintiff in this action. The Court held, "Plaintiff was reminded every month" about the account, and was on notice regarding the limited partnership account. *Id.* at 5. Defendants were also put on notice outside the six year eligibility date. Defendants' claim that there was a continuing fraud is not supported by case law.

Defendants are essentially requesting this Court to toll the time requirements of section 15 during the time period within which such representations were allegedly concealed. Three Circuits have addressed this precise issue and have held that section 10304 is not subject to equitable tolling, and therefore, not subject to tolling based on allegations of fraudulent concealment. *Ohio Company v. Nemecek*, 98 F.3d 234 (6th Cir. 1996); *Hofmann*, 984 F.2d 1372; *Edward D. Jones & Co. v. Sorrells*, 957 F.2d 509 (7th Cir. 1992). Without actually deciding the issue, this Circuit in *Cohen* expressed its agreement with the principle that "because section (10304) is an eligibility requirement rather than a procedural statute of limitations, claims are not subject to equitable tolling." *Cohen*, 62 F.3d at 385 n.4 (citing *Sorrells*, 957 F.2d at 513; *Hofmann*, 984 F.2d at 1378); *see also Osler v. Ware*, 114 F.3d 91, 93 n.1 (6th Cir. 1997) ("Indeed, similar to our conclusion in *Nemecek*, the Third and Eleventh Circuits have concluded that the running of the six-year period in § (10304) cannot be suspended by fraudulent concealment.") (citations omitted).

In *Nemecek*, the court recognized that if courts were to permit equitable tolling, they would be thwarting the intent of parties' arbitration agreement. *Nemecek*, 98 F.3d at 237. Moreover, if courts were to permit the tolling of section 10304 for allegations of fraudulent concealment, this would frustrate

the purpose of section 10304, which is to preclude investors from litigating stale claims. *See, e.g., Nemecek*, 98 F.3d at 237; *Dean Witter Reynolds, Inc. v. McCoy*, 853 F. Supp. 1023, 1030 (E.D. Tenn. 1995), *aff'd* 70 F.3d 1271 (6th Cir. 1995) (Table). In codifying section 10304, the NASD believed that six years was sufficient for investors to determine whether they had a viable claim. As recognized by the court in *Nemecek*, "the six-year eligibility period . . . is more generous than comparable periods allowed under either state or federal securities law." *Nemecek*, 98 F.3d at 237 (citations omitted). Therefore, because all of the occurrences and events complained of by Defendants occurred more than six years prior to the filing of their arbitration claim, and because section 10304 of the NASD Code is not subject to tolling for allegations of concealment, this Court holds that Defendants' arbitration claim is untimely.

Lastly, on September 28, 1988, Thomas transferred her funds and securities from her Smith Barney accounts to Thomson McKinnon Securities, Inc. Fazio Affidavit at ¶ 17. No further purchases or sales were made by Plaintiff. A claim is untimely if a broker's involvement in the account is severed prior to the eligibility cutoff date. *Roney and Co. v. Kassab*, 981 F.2d 894 (6th Cir. 1992); *Paine Webber, Inc. v. Farnam*, 870 F.2d 1286 (7th Cir. 1989).

It would be irreparable harm for arbitration to proceed on issues which are not subject to arbitration. *Hartman*, 921 F.2d 507. Holding the parties to the Agreement is the underlying goal of the Court, and the need for the issues to be decided, as to the arbitrability of some of the claims, outweighs the importance of the concerns for judicial economy. *Cohen*, 62 F.3d 381.

III. CONCLUSION

Defendants conclude that the Eleventh Circuit in *Cohen* relied on an improper holding in *Hofmann*, and therefore, their findings were incorrect. Additionally, Defendants argue that this Court should ignore Eleventh Circuit law, and follow California and New York State and Federal Law. However, the Eleventh Circuit is controlling law in the Southern District of Florida, and therefore, *Cohen* controls.

This Court may not decide the merits of an action, but it must determine which issues are arbitrable. The claims made by Defendants occurred prior to the six year eligibility date. Additionally, Defendants' claims of continuing wrongdoings were only made in attempt to toll the applicable eligibility cut-off.

Accordingly, after due consideration, it is

ORDERED AND ADJUDGED

1. Plaintiff, Salomon Smith Barney Inc., Motion for Summary Judgment is hereby **GRANTED**;

2. Defendants' Motion for Summary Judgment is hereby **DENIED**;

3. This Court hereby permanently enjoins Defendants from arbitrating any of their enumerated claims against Plaintiff under Section 10304 of the NASD Code of Arbitration Procedures;

4. This action is hereby Dismissed;

5. All pending motions are denied as moot; and

6. This Case is closed.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 20 day of April, 2000.

s/ William P. Dimitrouleas
WILLIAM P. DIMITROULEAS
United States District Judge

copies to:

Joseph Coates, III, Esq.
Stephen Krosschell, Esq.

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

[Filed March 28, 2000]

CASE NO. 99-8549-CIV-DIMITROULEAS/JOHNSON

SALOMON SMITH BARNEY INC.,

Plaintiff,

vs.

ARTHUR HARVEY, M.D., etc., et al,

Defendant.
_____/

ORDER

THIS CAUSE is before the Court on Defendant Thomas' Motion for Appointment of Guardian Ad Litem at Plaintiff's Expense, Motion for Extension of Discovery Deadlines and Supporting Memorandum of Law (Docket Entry No. 33). This Court has reviewed the pleadings filed incident to this matter and is otherwise duly advised in the premises. Accordingly, it is hereby

ORDERED AND ADJUDGED that said motion is **GRANTED IN PART and DENIED IN PART.**

Defendant Thomas' motion, to the extent it seeks appointment of a Guardian Ad Litem, is granted. The parties shall confer and provide the Court with the name of an

agreed-upon Guardian Ad Litem within ten (10) days of the date of this Order. If the parties cannot agree, each party shall name a proposed Guardian Ad Litem within ten (10) days, and this Court shall make the selection. This appointment shall be at Defendant Thomas' expense.

Defendant Thomas' motion, to the extent it seeks an order requiring such appointment be at Plaintiff Smith Barney's expense, is denied. The only case cited in support of Defendant Thomas' position that a party other than the moving party should pay the expenses of the guardian is *Allstate Ins. Co. v. Jones*, 763 F. Supp. 101 (M.D. Ala. 1991) which, apart from being merely persuasive authority, is entirely inapposite. In the instant case, unlike in *Allstate*, Defendant Thomas' role in this litigation was not "involuntary." *Id.* R 1102. Thomas initiated her claim against Smith Barney in arbitration, which in turn resulted in Smith Barney filing this declaratory action to determine the eligibility of Thomas' claims for arbitration. Thus, Thomas' role in this case cannot be said to be "involuntary." Additionally, Allstate does not suggest that the non-requesting party should be made to pay for the guardian **in advance**, but instead observes that under certain circumstances, which are absent here, it may be appropriate for the guardian's fees to be taxed as costs at the conclusion of the litigation.

Defendant Thomas' motion, to the extent it seeks an order extending the discovery deadlines, is deferred to the United States District Court, the Honorable William P. Dimitrouleas.

DONE AND ORDERED on March 27, 2000, in Chambers, at West Palm Beach, Florida.

s/ Linnea R. Johnson
LINNEA R. JOHNSON
UNITED STATES MAGISTRATE JUDGE

CC: The Honorable William P. Dimitrouleas
Stephen Krosschell, Esquire
Joel A. Goodman, Esquire
14020 Roosevelt Blvd. Ste. 808
P.O. Box 17709
Clearwater, Florida 33762
Joseph C. Coates, III, Esquire
Greenberg Traurig, P.A.
777 South Flagler Drive Ste. 300 East
West Palm Beach, Florida 33401

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

[Filed August 31, 1999]

CASE No. 99-8549-CIV-DIMITROULEAS

SALOMON SMITH BARNEY INC.,

Plaintiff,

vs.

ARTHUR HARVEY, M.D., individually, and as beneficiary of the Arthur Harvey, M.D. Inc., Employee Defined Benefit Plan; MARGARET G. OSTRANDER and DELORES THOMAS

Defendants.
_____/

ORDER GRANTING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

THIS CAUSE is before the Court upon Plaintiffs' Motion for Preliminary Injunction [DE 2]. The Court has carefully considered the motion, heard the arguments of counsel, and is otherwise fully advised in the premises.

I. BACKGROUND

On or about July 22, 1997, the Defendants filed a Uniform Submission Agreement and a Statement of Claim with the National Association of Securities Dealers Inc. ("NASD") against Plaintiff. On or about May 12, 1998, Defendants subsequently filed another NASD Statement of Claim. These claims allege that Plaintiff recommended imprudent investments, purchased by Defendants, beginning in 1985. Several state court suits were filed in Florida and California. The Fourth District Court of Appeals remanded one such state court claim to the trial court granting Plaintiff's claim of *forum non conveniens*. The Court notes that the Plaintiff in the present suit was a defendant in the state court suit. Plaintiff then filed this motion to enjoin Defendants from arbitrating claims against Plaintiffs that are ineligible for arbitration.

II. DISCUSSION

Preliminary Injunction Standard

In order to obtain a preliminary injunction, plaintiff must establish:

- -- A substantial likelihood that the plaintiff will prevail on the merits;
- -- A substantial threat that plaintiff will suffer irreparable injury if the injunction is not granted;
- -- The threatened injury to plaintiff outweighs the threatened harm the injunction may do to the defendants; and
- -- Granting the preliminary injunction will not disserve the public interest.

Church v. City of Huntsville, 30 F.3d 1332, 1342 (11th Cir. 1994). Because "[t]he preliminary injunction is an extraordinary and drastic remedy," it is "not to be granted until the movant

clearly carries the burden of persuasion as to the four prerequisites." *Id.* (quoting *Northeastern Fl. Chapter of the Ass'n of Gen. Contractors of Am. v. City of Jacksonville*, 896 F.2d 1283, 1285 (11th Cir. 1990)); *see also McDonald's Corp. v. Roberts*, 147 F.3d 1301 (11th Cir. 1998).

As to whether Plaintiff has a substantial likelihood of success of the merits, the issue of arbitrability must be addressed. It is settled law that unless there is "clear and unmistakable evidence" of the parties' intent to allow the arbitrator to determine arbitrability questions, this Court, and not the NASD arbitration panel, should determine whether the arbitration of the dispute between Plaintiff and Defendants is time barred by Section 10304 of the NASD Code of Arbitration Procedure. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Simon Cohen*, 62 F.3d 381 (11th Cir. 1995); *see also First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995). It must then be determined when any disputed issues of arbitrability should be heard. The Court must decide which claims are eligible for arbitration prior to the commencement of arbitration. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Simon Cohen*, 62 F.3d 381 (11th Cir. 1995).

Defendants argue that Plaintiff is aware of the Eleventh Circuit's rulings regarding the arbitrability of cases, and filed suit in the Southern District of Florida to avoid possible adverse decisions regarding what can be arbitrated. Defendants seek this Court to abstain, based upon pending parallel state court proceedings. Defendants also seek judicial estoppel, because of possible forum shopping practiced by Plaintiffs.

Since state court action is still pending, "dismissal is warranted in light of a concurrent state court action only when a balancing of relevant factors, 'heavily weighted in favor of the exercise of jurisdiction,' shows the case to be exceptional." *First Franklin Financial Corp. v. Gary McCollum*, 144 F.3d 1362

(11th Cir. 1998). *See Colorado River Water Conservation District, et al., v. United States*, 424 U.S. 800 (1976). In addition, "[t]he doctrine of abstention, under which a District Court may decline to exercise . . . its jurisdiction, is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it. . . only in the exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest." *Colorado River v. United States*, 424 U.S. 800 (1976).

To determine if a claim is an "exceptional circumstance," and whether a federal court should exercise concurrent jurisdiction when parallel state action is pending, the Eleventh Circuit has identified several factors based on the Courts' rulings in *Moses Cone* [6] and *Colorado River*. *First Franklin Corp. v. McCollum*, 144 F.3d 1362 (11th Cir. 1998). These include:

> (1) Relative convenience of the fora; (2) whether one court has established jurisdiction over property; (3) potential for piecemeal litigation; (4) the order in which the tribunals obtained and exercised jurisdiction; (5) the law to be applied; and (6) the adequacy of the state court to protect Plaintiff's rights. Id.

The first factor involved is the relative convenience of the fora. Defendants' contend that based on Plaintiff's knowledge of prior Eleventh Circuit holdings regarding the determination of arbitrability, Plaintiff was forum shopping, and request judicial estoppel, or abstention. Defendants continue to have pending litigation in Florida and California state courts.

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[6] *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1982).

The Fourth District Court of Appeals ruled that it was inconvenient for Plaintiff to try all of the cases in one forum, and subsequently ordered the severance of all of the consolidated cases. *Smith Barney v. Potter*, 725 So. 2d 1223 (Fla. 4th DCA 1999). Plaintiff is the defendant in the state court cases, and therefore cannot control in which jurisdiction it will be sued. Plaintiff, therefore filed this action in the Southern District of Florida, in the same jurisdiction the arbitration hearing was filed.[7]

> Our analysis of the district court's power to order the relief requested . . . begins with § 4 of the FAA, which prescribes authority and assigns limitations to federal courts in adjudicating arbitrable disputes . . . Section 4 allots . . . "A party aggrieved . . . may petition any United States district court which, save for agreement, would have jurisdiction . . . The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed."

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Peter Lauer and Therese Lauer, 49 F.3d 323 (7th Cir. 1995). Plaintiff continues to contend that it does not want to try all of the cases in one consolidated hearing. Plaintiff filed for severance of Defendants' claims with the arbitrator, and was denied.[8] Plaintiff exhausted all state court and arbitration avenues before filing in the District Court. This Court is thus the proper forum, under the first factor in *First Franklin Corp.*

The second factor, whether a Court has established jurisdiction over property, is inapplicable. As to the third

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[7] Arbitration was filed in Boca Raton, Florida.

[8] Based on undisputed oral argument of Plaintiff.

factor, the potential for piecemeal litigation is inevitable. Defendants, joined with two other parties,[9] filed their claim in Broward County state court, and filed their arbitration claim in Boca Raton. The Fourth District Court of Appeals ruled that it would be inconvenient for Plaintiff to litigate with the multiple Defendants jointly, in Broward County state court, and remanded, with instructions to the state court Judge, Judge Moriarty, to sever the claims. Now Plaintiff has joined Defendants in the Southern District of Florida, consolidating the cases and avoiding separate claims. Because Plaintiff is the Defendant in the state court claims, it does not know what forum they would be called to defend the claims against them, and therefore, it chose to join several Defendants in federal court. There are also pending state court claims in California and Florida, and the possibility of claims in Minnesota and Indiana.[10] Also, there are pending claims before the NASD arbitrator that will require several determinations on each question in dispute regarding arbitrability. Therefore, Plaintiff's filing in this District Court shall aid in the avoidance of piecemeal litigation.

The fourth factor involves the order in which the tribunals obtained and exercised jurisdiction. The state court claim was filed over two years ago. However, the Fourth District Court of Appeals divested the Florida state court of jurisdiction and ordered Judge Moriarty to sever the claims. The Florida state court obtained jurisdiction first, but was later divested of it. The California court has not exercised its jurisdiction. Both state courts obtained jurisdiction first, but the Southern District of Florida is able to exercise jurisdiction before a final order is entered in the state courts.

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[9] Martha Potter and Vincent Cipollaro.

[10] Defendants' Memorandum of Law in Opposition to Plaintiff's Motion for a Preliminary Injunction [DE 10] at 7.

The fifth factor is the law to be applied. This Court must apply federal law. As stated above, the Eleventh Circuit requires the Court to decide the issues of arbitrability, and to make these determinations prior to arbitration. The Court has jurisdiction because a federal question is involved. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Simon Cohen*, 62 F.3d 381 (11th Cir. 1995).

The final factor is the adequacy of the state court to protect the Plaintiff. Plaintiff has already convinced the Fourth District Court of Appeals that one consolidated case in Florida state court is not convenient. The state claims are to be brought in separate forums. However, because Plaintiff is unaware of the court it will be hailed into, it is uncertain whether state law will adequately protect it. Also, the arbitration is scheduled for November, and with the severance of the state claims in Florida and the arbitrators' denial of Plaintiff's motion to sever the arbitration claims, state law does not offer Plaintiff adequate relief.

In evaluating the six factors involved in a Court's decision to abstain from exercising concurrent jurisdiction, Plaintiff's claim seems to prevail over Defendants'. Thus, factors one, five and six favor Plaintiff, while only factor four favors Defendants. The factors necessary for this Court to abstain from exercising concurrent jurisdiction are not "exceptional" as mandated by the Court in *McCollum*. *First Franklin Corp. v. McCollum*, 144 F.3d 1362 (11th Cir. 1998).

This Court finds that Plaintiff did not attempt to deceive the state courts. Also, Plaintiff did not create the time restrictions making a preliminary injunction necessary. It attempted to remedy its claim with the state court and arbitrator before filing for an injunction in this District. Judicial Estoppel, therefore, is not appropriate in this case.

The Plaintiff also has a substantial likelihood of success on the merits of the case. This Court must make a threshold adjudication of which of Defendants' claims are time barred pursuant to the Arbitration Agreement. *Merrill Lynch, et al., v. Simon Cohen*, 62 F.3d 381 (11th Cir. 1995). Therefore, this Court must maintain the status quo pending its determination of the eligibility of Defendants' claims.

Plaintiff maintains that it will be injured if the injunction is not granted. If the status quo is not maintained, the arbitration board will decide any issues of arbitrability while this case is pending. It would be irreparable harm for arbitration to proceed on issues which are not subject to arbitration. *PaineWebber Inc. v. Hartman*, 921 F.2d 507 (3d Cir. 1990). Plaintiff will likely suffer irreparable harm if a preliminary injunction is not issued.

The irreparable harm to Plaintiff compares to the threatened harm of temporarily enjoining arbitration as to certain particular claims of Defendants. Holding the parties to the Agreement is the underlying goal of the Court, and the need for the issues to be decided, as to the arbitrability of some of the claims, outweighs the importance of the concerns for judicial economy. *Merrill Lynch, et al., v. Simon Cohen*, 62 F.3d 381 (11th Cir. 1995). The threatened harm to Plaintiff outweighs the threatened harm to Defendants.

The final element to obtain a preliminary injunction is the effect on the public interest. The public must have confidence in the Courts to ensure the procedure of claims to be arbitrated are followed, and to ensure that claims which are not subject to arbitration are not arbitrated. *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 673 (1986). Therefore, the public interest is protected by the issuance of the injunction.

III. CONCLUSION

Accordingly, after due consideration, it is

ORDERED AND ADJUDGED

1. Plaintiff, Salomon Smith Barney Inc., Motion for Preliminary Injunction [DE 2] is hereby **GRANTED.**

2. This Court hereby enjoins Defendants from arbitrating any claim against Plaintiff until the Court determines whether Defendants' claims are eligible for arbitration under Section 10304 of the NASD Code of Arbitration Procedures.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 31 day of August, 1999.

s/ William P. Dimitrouleas
WILLIAM P. DIMITROULEAS
United States District Judge

copies to:

~~Marc Crisafulli, Esq.~~
~~Donna Greenspan, Esq.~~
~~Robert Pershes, Esq.~~

Bradford D. Kaufman, Esq.
Stephen Krosschell, Esq.

Supreme Court, U.S.
FILED
JAN 2 2002
CLERK

(2)

No. 01-801

IN THE

Supreme Court of the United States

ARTHUR HARVEY, M.D., individually and as beneficiary of the Arthur Harvey, M.D. Inc. Employee Defined Benefit Plan, and CECILIA M. CROWE, as Guardian ad Litem for DOLORES THOMAS,

Petitioners,

v.

SALOMON SMITH BARNEY, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

BRADFORD D. KAUFMAN
JOSEPH C. COATES, III
GREENBERG TRAURIG, P.A.
777 South Flagler Drive
Suite 300 East
West Palm Beach, Florida 3401
(561) 650-7900

ELLIOT H. SCHERKER
Counsel of Record
BRENDA K. SUPPLE
GREENBERG TRAURIG, P.A.
1221 Brickell Avenue
Miami, Florida 33131
(305) 579-0500

Attorneys for Respondent

171476

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

In *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), this Court – following its long-standing precedent – unanimously ruled that the arbitrability of a dispute presents a question for the courts, rather than one to be decided by arbitrators, unless there is clear and unmistakable evidence that the parties agreed to allow the arbitrators to decide that question. The Eleventh Circuit's opinion faithfully applied *First Options*: after reviewing the arbitration agreement and finding no clear and unmistakable evidence of an intent to allow the arbitrators to decide the arbitrability of the dispute, the court held that the issue was properly decided by the courts.

The Eleventh Circuit's ruling is unexceptional and its decision has no far-reaching implications to arbitration law. Petitioner merely seeks to have this Court review several provisions of the parties' arbitration agreements and the National Association of Securities Dealers ("NASD") Code of Arbitration Procedures, a Code which is subject to ongoing review and revision by the NASD.

The question presented is:

Whether the Eleventh Circuit properly interpreted the parties' arbitration agreement to find that there is no clear and unmistakable evidence authorizing the arbitrators to decide the arbitrability of the dispute.

STATEMENT PURSUANT TO RULE 29.6

Salomon Smith Barney, Inc. is wholly owned by Salomon Brothers Holding Co. Inc. which in turn is wholly owned by Salomon Smith Barney Holding Inc. which is wholly owned by Citigroup Inc., a publicly traded company.

TABLE OF CONTENTS

	Page
Question Presented	i
Statement Pursuant to Rule 29.6	ii
Table of Contents	iii
Table of Cited Authorities	iv
Statement of the Case	1
Reasons for Denying the Writ	5
I. The Eleventh Circuit Properly Applied *First Options*.	8
II. The Eleventh Circuit's Decision Does Not Conflict With This Court's Precedent.	11
III. Petitioners' "Scope" and "Drafting" Arguments Are Contrary to *First Options*.	13
IV. New York Law Does Not Govern This Case	16
V. The Eleventh Circuit Properly Interpreted the Arbitration Agreements.	17
Conclusion	20

TABLE OF CITED AUTHORITIES

Page

Cases:

AT&T Tech., Inc. v. Communications Workers of Am., 475 U.S. 643 (1986) 5, 6, 7, 8, 10, 15, 18

Atkinson v. Sinclair Refining Co., 370 U.S. 238 (1962), *overruled in part on other grounds, Boys Markets, Inc. v. Retail Clerks*, 398 U.S. 235 (1970) 6, 12

Dean Witter Reynolds, Inc. v. Fleury, 138 F.3d 1339 (11th Cir. 1998) 9

Dean Witter Reynolds, Inc. v. Howsam, 261 F.3d 956 (10th Cir. 2001) 11

First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995) ..... *passim*

FSC Sec. Corp. v. Freel, 811 F. Supp. 439 (D. Minn. 1993), *aff'd*, 14 F.3d 1310 (8th Cir. 1994) 11

John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964) 11, 12, 13

Kaplan v. First Options of Chicago, Inc., 19 F.3d 1503 (3d Cir. 1994), *aff'd*, 514 U.S. 938 18

Local 285 Service Employees Int'l Union v. Nonotuck Resource Assocs., Inc., 64 F.3d 375 (1st Cir. 1995) 13

Cited Authorities

Page

Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52 (1995) 16, 17

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Lauer, 49 F.3d 323 (7th Cir. 1995) 3

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cohen, 62 F.3d 381 (11th Cir. 1995) 13

Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983) 14, 16, 17

PaineWebber Inc. v. Elahi, 87 F.3d 589 (1st Cir. 1996) 11

PaineWebber Inc. v. Farnam, 870 F.2d 1286 (7th Cir. 1989) 11

PaineWebber Inc. v. Hartmann, 921 F.2d 507 (3d Cir. 1990) 10

Scobee Combs Funeral Home, Inc. v. E.F. Hutton & Co., 711 F. Supp. 605 (S.D. Fla. 1989) 2

Smith Barney Inc. v. Potter, 725 So. 2d 1223 (Fla. 4th DCA 1999) 1, 3

Smith Barney Shearson, Inc. v. Sacharow, 689 N.E.2d 884 (N.Y. 1997) 16

Cited Authorities

	Page
United Steelworkers v. American Mfg. Co., 363 U.S. 564, 80 S. Ct. 1343 (1960)	6
United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960)	6
United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960)	6, 7
Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ., 489 U.S. 468 (1989)	5, 6
Statutes:	
9 U.S.C. §§ 1-16	5, 16
9 U.S.C. § 2	16
Other Authority:	
17 C.F.R. § 240.17 a-4	2
NASD Code of Arbitration Procedure § 15	9, 11
NASD Code of Arbitration Procedure § 10304	*passim*

STATEMENT OF THE CASE

Due to Petitioners' procedural jockeying, this case has a somewhat tortured procedural history that began in July 1997, when Petitioners joined a pending National Association of Securities Dealers ("NASD") arbitration claim initially filed by another claimant (who was not a party to the proceedings in the lower courts). App. 2.[1] That arbitration proceeding was administered in Boca Raton, Florida. None of the Petitioners had any relationship to the original NASD claimant. Rather, "[e]ach of the [NASD Claimants was] a separate investor with [Salomon Smith Barney, Inc. ("Smith Barney")]. Each resides in a different state, and each made different investments through Smith Barney at a separate time and place, without any then existing legal connection with any of the other [Claimants]." *Potter*, 725 So. 2d at 1224. Moreover, Petitioners are not from Florida and this claim has no relationship to that state.

Petitioners' NASD claims involve allegations that certain limited partnerships purchased between 1985 through 1990 "were unsuitable and inappropriate for the investment objectives of the [Petitioners]." App. 2.[2] They initiated the

1. Indeed, a Florida appellate court described Petitioners' maneuverings as the "rankest forum shopping by out-of-state interests." *Smith Barney Inc. v. Potter*, 725 So. 2d 1223, 1226 (Fla. 4th DCA 1999).

2. Smith Barney requested that the NASD sever the Petitioners' claims because Petitioners reside in different states and made different investments. App. 2. The NASD Director of Arbitration granted the request to sever the Petitioners' claims. *Id.* Petitioners then persuaded the arbitrators to reconsider the severance order. Upon reconsideration, the arbitrators disregarded the NASD Director's prior ruling and permitted the Petitioners to proceed in a single arbitration. *Id.*

litigation over the interpretation of the NASD Code when "[s]imultaneous with the filing of [their] NASD claim, [Petitioners] filed a state court action in Broward County, Florida," seeking "a declaration that the NASD panel, not the courts, should rule on the six-year eligibility requirement articulated in the NASD Code of Arbitration." App. 3.

Section 10304 of the NASD Code of Arbitration, which provision Petitioners had agreed would govern their claims,[3] includes the following eligibility provision:

> No dispute, claim, or controversy shall be eligible for submission to arbitration under this Code where six (6) years have elapsed from the occurrence or event giving rise to the act or dispute, claim or controversy.

App. 6.[4]

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3. Petitioner Harvey signed several arbitration agreements providing for NASD arbitration. Petitioner Thomas did not execute any pre-dispute arbitration agreement with Smith Barney. Instead, Thomas relied on the NASD Code itself as the arbitration agreement. Petition at 6, 6 n.5. Several courts have ruled that the NASD Code imposes an obligation on NASD members to arbitrate with their customers because the customers are third-party beneficiaries of the NASD Arbitration Code. *See, e.g., Scobee Combs Funeral Home, Inc. v. E.F. Hutton & Co.*, 711 F. Supp. 605, 608 (S.D. Fla. 1989) (where no written pre-dispute arbitration agreement existed between NASD members and a customer, the NASD Code was "binding on Defendants and . . . the customer, Scobee, an intended third-party beneficiary, has standing to enforce that provision against them.").

4. The six-year limit imposed by the NASD eligibility rule is the longest length of time that brokerage firms are mandated by the rules of the Securities and Exchange Commission to maintain their customer documents. *See, e.g.*, 17 C.F.R. § 240.17 a-4.

In Petitioners' state court action, Smith Barney asserted that the case should be severed and/or dismissed on grounds of *forum non conveniens* because of Petitioners' lack of any relationship with Florida. App. 3. The trial court denied Smith Barney's motion. *Id.* The matter made its way to the Florida Fourth District Court of Appeal, which reversed the trial court upon a holding that Petitioners had engaged in impermissible forum shopping. *Potter*, 725 So. 2d at 1226-27. The Fourth District directed the trial court on remand to enter orders to ensure that Petitioners could reinstate their cases in an alternative forum. *Id.* at 1227.

Despite that ruling, Petitioners did not attempt to refile their claims in an alternative forum; rather, they continued to press the Florida arbitration. Armed with the Fourth District's ruling, Smith Barney requested that the arbitrators sever the Petitioners' claims in the arbitration proceeding. The arbitrators, however, refused to sever the claims. App. 3.

Smith Barney then instituted an action in the Southern District of Florida, seeking to enjoin the arbitration on the ground that the claims were ineligible for arbitration under the NASD's six-year eligibility rule, as set forth in NASD Code Section 10304. App. 4.[5] Smith Barney asserted that Section 10304 creates an arbitrability issue that, under *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), was for the court to decide.

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5. Smith Barney filed its action in the Southern District of Florida because, under extant law, it was required to institute its action in the district in which the arbitration was pending. *See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Lauer*, 49 F.3d 323, 327 (7th Cir. 1995).

The district court ruled that Section 10304 addresses the issue of arbitrability and that it was for the court to decide whether Petitioners' claims were ineligible for arbitration. The court granted Smith Barney's motion for a preliminary injunction to preserve the status quo pending a determination of the threshold arbitrability issue. App. 4. The parties then cross-moved for summary judgment on the issue of whether the Petitioners' claims were eligible for arbitration under Section 10304. *Id.* Finding that all of Petitioners' claims arose from the point of sale of the limited partnerships, which had occurred more than six years before they filed their arbitration claim, the district court permanently enjoined Petitioners' arbitration claims as ineligible for arbitration. *Id.*[6]

On appeal, the Eleventh Circuit, faithfully applying this Court's *First Options*, decision, held that the parties' arbitration agreement did not reflect clear and unmistakable evidence of the parties' intent to allow the arbitrators to decide the arbitrability of the dispute. App. 5-11. The court accordingly ruled that the district court properly had determined that the issue of arbitrability was for the court to decide. App. 11.

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6. Petitioner Thomas sought the appointment of a guardian ad litem – at Smith Barney's expense – prior to the court's ruling on the summary judgment motions. *Id.* The magistrate judge granted Thomas's motion for appointment of a guardian ad litem, but denied her request that Smith Barney pay the expenses of the guardian. *Id.* Thomas did not attempt to name a guardian ad litem, pursuant to the terms of the magistrate judge's order, until almost one month after the district court had granted Smith Barney's summary judgment motion; the district court granted the motion to appoint the named guardian ad litem. App. 28-29.

The Eleventh Circuit further held that the district court properly had analyzed the question whether Petitioners' claims were eligible for submission under the NASD six-year eligibility rule. App. 6-8. The court rejected Petitioners' argument that the district court improperly had passed upon the merits of the underlying case. *Id.* at 8. ("Under the facts of this case, we hold that the District Court did not abuse its discretion in making its findings, nor did the District Court improperly pass upon the merits of the case.").[7]

REASONS FOR DENYING THE WRIT

The legal principles underpinning the Eleventh Circuit's ruling were announced – and have repeatedly been affirmed – by this Court. As a fundamental starting point, "[a]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *AT&T Tech., Inc. v. Communications Workers of Am.*, 475 U.S. 643, 648 (1986) (citations and internal quotations omitted). Three years after pronouncing this principle, the Court reiterated the rule in *Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468 (1989), holding that the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, "does not require parties to arbitrate when they have not agreed to do so, . . . nor does it prevent parties who do agree to arbitrate from excluding certain claims from the scope of their arbitration agreement," but that the FAA "simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms." *Id.* at 478 (citations and internal quotations omitted).

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7. The Eleventh Circuit also concluded that the district court properly had dealt with the guardian ad litem issue, in particular because Thomas had delayed the selection of a guardian. App. 10-11. See n.6, *supra*.

> Arbitration under the Act is a matter of consent, not coercion, and the parties are generally free to structure their arbitration agreements as they see fit. Just as they may limit by contract the issues which they will arbitrate, so too may they specify by contract the rules under which that arbitration will be conducted.

Id. at 479.

As the Court noted in *AT&T*: "[T]he principles necessary to decide this case are not new. They were set forth over 25 years ago in a series of cases known as the "Steel Workers Trilogy," i.e., *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 80 S. Ct. 1343 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). *AT&T*, 475 U.S. at 649. The Court reiterated that the question whether the parties had agreed to arbitrate a dispute was for the court to decide:

> [T]he question of arbitrability – whether a collective-bargaining agreement creates a duty for the parties to arbitrate the particular grievance – is undeniably an issue for judicial determination. Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator.

Id. at 649 (citing *Warrior & Gulf*, 363 U.S. at 582-83 and *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 241 (1962), *overruled in part on other grounds, Boys Markets, Inc. v. Retail Clerks*, 398 U.S. 235 (1970)). The Court accordingly

held that it was "the court's duty to interpret the agreement and to determine whether the parties intended to arbitrate." *Id.* at 651.

In *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), the Court unanimously set forth the standards for determining whether the courts or the arbitrators are to decide the issue of arbitrability. The Court held that the courts decide whether the parties have agreed to arbitrate a dispute unless there is "clear and unmistakable evidence" that the parties agreed to have the arbitrators decide the issue. *Id.* at 944 (quoting *AT&T*, 475 U.S. at 649). If the arbitration agreement is silent or ambiguous, *the courts are to decide the issue of arbitrability*. *Id.* at 944-45. The Court noted

> given the principle that a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration, one can understand why courts might hesitate to interpret silence or ambiguity on the "who should decide arbitrability" point as giving the arbitrators that power, for doing so might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide.

Id. at 945 (citations omitted).

This case presents nothing more than a proper application of this Court's decisions by the Eleventh Circuit. The governing precedent summarized above has created four primary rules: (1) arbitration is a matter of contact; (2) a party can not be required to submit to arbitration a dispute it has not agreed to arbitrate; (3) the courts generally decide arbitrability, i.e., whether the parties have agreed to submit

a dispute to arbitration; and (4) it is only when there is clear and unmistakable evidence of an intent to allow the arbitrators to decide the issue that the courts should not decide arbitrability. The Eleventh Circuit's opinion, holding that the courts properly are to decide the arbitrability of the dispute between Smith Barney and Petitioners – based on the particular language of the agreements between the parties, which does not reflect the requisite clear and unmistakable evidence of an intent to allow the arbitrators to decide arbitrability – is a correct application of these rules.

There is no need for the Court to revisit these principles of arbitration law. While the Circuits are admittedly split on the interpretation of the NASD Code's language and the interplay of that language with the provisions of various arbitration agreements, there is no broad national rule that could emerge from this case – which is, after all, merely a case of contract interpretation.

I. The Eleventh Circuit Properly Applied *First Options*.

The Eleventh Circuit was presented with an issue of arbitrability. The very wording of NASD's six-year rule, stating that "no dispute . . . shall be eligible for submission under this Code," § 10304, NASD Code of Arbitration Procedure, makes this clear. As *First Options* noted, the issue of arbitrability focuses on whether the parties agreed to arbitrate the merits of the dispute. 514 U.S. at 942. The question whether certain claims are *excluded* from arbitration, like the exclusion in *AT&T*, goes directly to the issue of arbitrability. Relying on *First Options* and its prior decision in *Dean Witter Reynolds, Inc. v. Fleury*, 138 F.3d 1339, 1342 (11th Cir. 1998), the Eleventh Circuit held that Section 10304 is a substantive arbitrability provision:

> It is well settled that the NASD eligibility requirement is a substantive requirement, and, absent clear and unmistakable evidence, the court determines whether claims are timely under the NASD Code. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) ("Courts should not assume that the parties had agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so.") (quoting *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 649 (1986)); *see also Dean Witter Reynolds, Inc. v. Fleury*, 138 F.3d 1339, 1342 (11th Cir. 1998) ("[Section] 15 of the NASD Code is not a procedural statute of limitations but a substantive eligibility requirement, determining the arbitrability of a given claim.").

App. 5 (footnote omitted).[8]

The conclusion reached by the Eleventh Circuit derives from the plain meaning of the words used in Section 10304:

> "Eligible" is defined as "fitted or qualified to be chosen or used" or "worthy to be shown or selected." Webster's Third New International Dictionary 736 (1966). "Submission" is defined as "the act of commi[tting something] for consideration, study or decision."

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8. In July 1996, the NASD published a new NASD manual which, among other things, assigned a new numerical system to the NASD Code of Arbitration Procedure. Under the newer version of the Code, the former NASD Code § 15 is now labeled § 10304. App. 5, n.1.

PaineWebber Inc. v. Hartmann, 921 F.2d 507, 513 (3d Cir. 1990). This Court has described arbitrability in a similar fashion. *See, e.g., AT&T Tech.*, 475 U.S. at 648 ("a party cannot be required to *submit* to arbitration any dispute which he has not *agreed* so to *submit*.") (emphasis added; citations omitted); *First Options*, 514 U.S. at 943 ("arbitration is simply a matter of contact between the parties; it is a way to resolve those disputes – but only those disputes – that the parties have *agreed* to *submit* to arbitration.") (emphasis added); *id.* at 945 ("given the principle that a party can be forced to arbitrate only those issues it specifically has *agreed* to *submit* to arbitration. . . .") (emphasis added).

Hewing closely to *First Options*, the Eleventh Circuit looked to the language of the parties' arbitration agreements to determine whether there was clear and unmistakable evidence of an agreement to allow the arbitrators to decide arbitrability. The Court expressly applied the *First Options* standard in reaching its conclusion that the courts and not the arbitrators decide the Section 10304 issue, and there is nothing in the decision that conflicts with *First Options*.

This Court has repeatedly ruled on the manner in which courts should deal with the arbitrability issue, and granting certiorari in this case would add nothing to that jurisprudence. Even if the Eleventh Circuit's ruling that Section 10304 of the NASD arbitration rules concerns the arbitrability of the parties' dispute (because the provision excludes a category of claims), were somehow incorrect, that ruling is contract-specific and presents no question of national importance. This case hinged on resolving the precise language and effect of several provisions in the arbitration agreements and the NASD Code of Arbitration, and nothing more.

Finally, it is worth noting that, while Petitioners argue that the Eleventh Circuit's ruling undermines the intent of the NASD and the SEC to provide a speedy and inexpensive procedure for resolving disputes, Petition at 15-17, their argument actually demonstrates why a ruling by this Court interpreting the provisions of the NASD Arbitration Code is not warranted. If the Eleventh Circuit's interpretation of the NASD Code indeed turns out to have a negative impact on NASD arbitration, the NASD can revise its Arbitration Code. Indeed, the NASD has considered doing just that on several occasions over the years. *See Dean Witter Reynolds, Inc. v. Howsam*, 261 F.3d 956 (10th Cir. 2001) (noting that the NASD had proposed at least two amendments to § 10304 in 1994 and 1998 that would have resolved the "who decides arbitrability" issue, but that the latest proposal has either been withdrawn or not approved by the SEC).[9]

II. The Eleventh Circuit's Decision Does Not Conflict With This Court's Precedent.

Petitioners assert that the Eleventh Circuit's ruling is contrary to *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964) – a contention that is somewhat surprising, because Petitioners did not cite to *John Wiley* in their briefs

9. The NASD's sometimes conflicting views and comments on Section 10304 have affected how several courts have interpreted that section. *See, e.g., PaineWebber Inc. v. Farnam*, 870 F.2d 1286, 1292 (7th Cir. 1989) (considering 1988 NASD letter stating NASD would not process ineligible claims); *PaineWebber Inc. v. Elahi*, 87 F.3d 589, 596 (1st Cir. 1996) (noting that in 1996 the NASD's current view was that the NASD Code was silent on whether courts or arbitrators decide the eligibility of claims); *FSC Sec. Corp. v. Freel*, 811 F. Supp. 439, 444 n.6 (D. Minn 1993) (noting NASD has taken conflicting positions on interpretation of § 15 [now §10304]), *aff'd*, 14 F.3d 1310 (8th Cir. 1994).

to the Eleventh Circuit. It is, in any event, a futile attempt to invoke the Court's jurisdiction.

The arbitration provision in *John Wiley* is fundamentally different from the six-year eligibility rule at issue here. *John Wiley* addressed the question whether procedural conditions precedent to filing an arbitration, *i.e.*, a four-week notice requirement before the claimant could file a grievance, had been satisfied. *John Wiley*, 376 U.S. at 555-59. The Court commenced its review by restating the general rule that courts are to decide the issue of arbitrability:

> Under our decisions, whether or not the company was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court on the basis of the contract entered into by the parties.

Id. at 546-47 (quoting *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 241 (1962), *overruled in part on other grounds*, *Boys Markets, Inc. v. Retail Clerks*, 398 U.S. 235 (1970).

Nothing in the agreement at issue in *John Wiley* suggested that certain claims could be excluded from submission to arbitration – which is the language of the agreement construed by the Eleventh Circuit in this case. The actual holding of *John Wiley* disposes of Petitioners' argument:

> Once it is determined, as we have, that the parties *are obligated to submit the subject matter of the dispute of arbitration*, "procedural" questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator.

376 U.S. at 557 (emphasis added).

That is exactly what the Eleventh Circuit did in this case. The court determined whether the parties are obligated to submit the subject matter of the dispute to arbitration. The Eleventh Circuit was faced with an arbitration agreement that excluded certain claims from submission to arbitration – those claims arising from occurrences or events over six years.[10] Nothing in the *John Wiley* opinion conceivably could suggest that the Eleventh Circuit's application of *First Options* was in error. Nor does the Eleventh Circuit's ruling in any way jeopardize or contravene this Court's holding in *John Wiley*; the purported conflict simply does not exist.[11]

III. Petitioners' "Scope" and "Drafting" Arguments Are Contrary to *First Options*.

Petitioners seek to manufacture a conflict by citing to cases holding that questions regarding the scope of arbitration agreements are to be resolved in favor of arbitration.

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10. Petitioners' reliance on *Local 285 Service Employees Int'l Union v. Nonotuck Resource Assocs., Inc.*, 64 F.3d 375 (1st Cir. 1995), is similarly misplaced because it dealt with whether the parties complied with conditions precedent, such as those in *John Wiley*. That decision does not address an *eligibility* question, such as was addressed by the Eleventh Circuit here, under the specific language of Section 10304.

11. Petitioners also cite to a provision of the Uniform Arbitration Act as support for their proposition that arbitrators interpret time-limitations, waiver and laches defenses. Petition at 5. These provisions have no application here. Surely, Petitioners do not suggest that a party cannot impose a temporal limitation on the scope of the arbitration agreement. By its very wording, Section 10304 is not a statute of limitations or a laches defense. It is, as the Eleventh Circuit has noted, "a substantive limitation on the claims that may be submitted to arbitration." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cohen*, 62 F.3d 381, 384 (11th Cir. 1995).

See, e.g., Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983). As this Court made clear in *First Options*, however, the presumption in favor of arbitration decidedly does *not* apply to the unique question of arbitrability:

> This Court, however, has (as we have just said) added an important qualification, applicable when courts decide whether a party has agreed that arbitrators should decide arbitrability: Courts should not assume that the parties agreed to arbitrate arbitrability unless there is "clear and unmistakabl[e]" evidence that they did so. In this manner the law treats silence or ambiguity about the question "who (primarily) should decide arbitrability" differently from the way it treats silence or ambiguity about the question "whether a particular merits-related dispute is arbitrable because it is within the scope of a valid arbitration agreement" – for in respect to this latter question the law reverses the presumption.

First Options, 514 U.S. at 944-45. (citations omitted).

In yet another example of their misreading of *First Options*, Petitioners argue that the meaning of Section 10304, as well that provision's interplay with other NASD Code provisions, is ambiguous. Proof of this ambiguity, Petitioners claim, is revealed by cases construing the NASD Code. According to the Petitioners, if courts differ on the interpretation of an agreement, it means the agreement is *per se* ambiguous. Leaving aside whether Petitioners' rule of contract interpretation is – or should ever be – the law in any

jurisdiction, this contention should give Petitioners no solace. This is so because *First Options* holds that if an agreement is ambiguous, it means the court decides arbitrability. 514 U.S. at 944-45. And arbitrability is what this case is all about.

Petitioners also maintain that the Eleventh Circuit erred because it is the rule that arbitration agreements are to be construed against the drafter. Petition at 17.[12] This argument utterly fails to demonstrate a conflict in the precedent – if for no other reason than its tacit premise that the *courts* should interpret arbitration agreements. Moreover, Petitioners simply ignore the *First Options* presumption, under which arbitration agreements are construed presumptively to prohibit arbitrators deciding arbitrability.

Together with their scope argument, Petitioners assert that only the most "forceful evidence" can remove claims from the scope of broad arbitration obligations. Petition at 14. This argument, much like Petitioners' other contentions, is contrary to this Court's rulings. In *AT&T*, the Court noted that its "forceful evidence" standard only applies "[i]n the absence of any express provision excluding a particular grievance from arbitration." *AT&T*, 475 U.S. at 650. This case presents such an express provision that excludes a certain category of claims from arbitration.[13]

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12. Petitioners' argument necessarily assumes that *Smith Barney* drafted the NASD Code provisions at issue, an assumption that is bereft of any record support.

13. Petitioners' further argument that the Eleventh Circuit's ruling contradicts ERISA law is specious, primarily because their scatter-shot NASD arbitration claim *did not include an ERISA claim.*

In *First Options*, this Court set the standard as to which presumption applies when arbitrability is at issue. The Court need not re-address that settled issue – and Petitioners, who are not only wrong on the law and the presumption, present nothing to suggest that the Court should do so.

IV. New York Law Does Not Govern This Case

In yet another misplaced effort to attract the Court's attention to their Petition, Petitioners argue that the Eleventh Circuit erred by refusing to follow the New York courts' interpretation of Section 10304. Petitioners maintain that the Eleventh Circuit was obliged to follow *Smith Barney Shearson, Inc. v. Sacharow*, 689 N.E.2d 884 (N.Y. 1997). This argument, like Petitioners' other contentions, is at odds with this Court's prior rulings.

As a starting point, Petitioners do not dispute that this case is governed by the Federal Arbitration Act, 9 U.S.C. §§ 1-16, because the parties' underlying relationship involves interstate commerce. In *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983), the Court ruled that 9 U.S.C. § 2 "create[s] a body of federal substantive law of arbitrability, applicable to any arbitration agreement within coverage of the Act." *Id.* at 24. The Eleventh Circuit followed federal substantive arbitration law and looked to *First Options*, and its own prior decisions for its holding. App. 5-11.

Moreover, this Court has previously addressed a New York choice-of-law provision in an arbitration agreement in *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995). In that case, Shearson challenged an award of punitive damages by an arbitration panel on the ground that a New York choice-of-law provision incorporated

New York arbitration law, which precluded arbitrators from awarding punitive damages. The Court held that the New York choice-of-law provision did not apply to the arbitration provisions:

> We think the best way to harmonize the choice-of-law provision with the arbitration provision is to read "the laws of the State of New York" to encompass substantive principles that New York courts would apply, but not to include special rules limiting the authority of arbitrators. Thus, the choice-of-law provision covers the rights and duties of the parties, while the arbitration clause covers arbitration . . . .

Id. at 63-64.

Under *Mastrobuono*, a provision that requires the application of New York *substantive* law does not implicate New York *arbitration* law. Petitioners' arguments are at odds with the law previously announced by this Court in *Moses H. Cone* and *Mastrobuono*.

V. The Eleventh Circuit Properly Interpreted the Arbitration Agreements.

Most of Petitioners' remaining arguments focus on their contention that the district court and Eleventh Circuit erred in ruling that the Petitioners' claims were ineligible because they were brought more than six years after the occurrence or event giving rise to the claim. Contrary to Petitioners' contentions, the Eleventh Circuit expressly noted that the district court did not delve into the merits of the parties' dispute. App. 7-8. Rather, it looked to the claims to determine

whether they were eligible for arbitration. That involved the unremarkable process of reading the Petitioners' claims. This analysis necessarily involves an examination of the particular allegations brought by the Petitioner in the arbitration claim.

This Court has ruled that, in deciding the arbitrability issue, courts would have to look at the parties' arbitration agreement, and compare the agreement to the claims being brought to determine whether a particular claim is arbitrable. A prime example of this rule is the Court's holding in *AT&T*, 475 U.S. at 649, where the Court reversed the Seventh Circuit with directions to have the court examine whether a particular dispute was excluded from arbitration. Similarly, in *First Options*, the Court affirmed the Third Circuit, which had examined the record to determine whether the parties had agreed to arbitrate. *Kaplan v. First Options of Chicago, Inc.*, 19 F.3d 1503 (3d Cir. 1994), *aff'd*, 514 U.S. 938.

For the courts to examine whether a claim is eligible for arbitration does not undermine arbitration policy – because, as the Court ruled, the primary policy is to enforce arbitration agreements as written:

> There is no strong arbitration-related policy favoring *First Options* in respect to its particular agreement here. After all, the basic objective in this area is not to resolve disputes in the quickest manner possible, no matter what the parties wishes, but to ensure that commercial arbitration agreements, like other contracts are enforced according to their terms. . . .

First Options, 514 U.S. at 947 (citations omitted).

Against that backdrop, the Eleventh Circuit ruled that the district court properly performed this function by examining each and every one of the Petitioners' claims, and finding that the claims arose out of the purchase of the limited partnerships more than six years before they filed their claim. App. 2, 7, 11. It was undisputed that:

- Petitioners' allegations concerning Smith Barney all involved limited partnerships purchased by Petitioner Thomas, prior to April 8, 1998 and by Petitioner Harvey, prior to August 31, 1990;

- Thomas did not maintain an investment account at Smith Barney after September 28, 1988;

- Petitioners' arbitration claim sought damages and interest running "from the date of purchase" of the limited partnerships at issue, thus establishing their claims arose from the *purchase* of the limited partnerships.

- Petitioners waited until July 1997 to file their claims with the NASD.

App. 2, 6, 15, 21, 25

The district court read the arbitration claim and found that all of the claims specifically sought damages and interest running from the time of purchase and commissions received from the transactions, and concluded that they all were point of sale or purchase claims. App. 21. This case-specific inquiry does not warrant this Court's intervention.

CONCLUSION

For the foregoing reasons, Smith Barney respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

BRADFORD D. KAUFMAN
JOSEPH C. COATES, III
GREENBERG TRAURIG, P.A.
777 South Flagler Drive
Suite 300 East
West Palm Beach, Florida 3401
(561) 650-7900

ELLIOT H. SCHERKER
Counsel of Record
BRENDA K. SUPPLE
GREENBERG TRAURIG, P.A.
1221 Brickell Avenue
Miami, Florida 33131
(305) 579-0500

Attorneys for Respondent